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EDITOR'S NOTE

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No. 86-805-CFX
Status: GRANTED

Title: Billy J. "B.J." Pinter, et al., Petitioners
v.
Maurice Dahl, et al.

Docketed:
November 18, 1986

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Sparks,Braden W.

Counsel for respondent: Spinuzzi,John A., Linz,Michael F.

Entry	Date	Note	Proceedings and Orders
1	Oct 9 1986		Application for extension of time to file petition and order granting same until November 18, 1986 (White, October 14, 1986).
2	Nov 18 1986	G	Petition for writ of certiorari filed.
6	Dec 23 1986		DISTRIBUTED. January 16, 1987.
8	Feb 6 1987		Order extending time to file response to petition until March 4, 1987.
9	Mar 6 1987		Order further extending time to file response to petition until March 6, 1987.
10	Mar 6 1987		Order further extending time to file response to petition until March 10, 1987.
11	Mar 9 1987		Brief of respondent Maurice Dahl in opposition filed.
12	Mar 11 1987		REDISTRIBUTED. March 27, 1987
13	Mar 21 1987	X	Reply brief of petitioners Billy Pinter, et al. filed.
14	Mar 27 1987		Relisted by Justice Powell for April 3, 1987
15	Mar 30 1987		REDISTRIBUTED. April 3, 1987
16	Apr 3 1987		Relisted by Justice Powell for April 17, 1987
17	Apr 13 1987		REDISTRIBUTED. April 17, 1987
18	Apr 20 1987		Petition GRANTED.
			**********
19	May 8 1987		Record filed.
20	May 8 1987		Certified copy of original record and proceedings, 11 volumes, received.
22	May 11 1987		Order extending time to file brief of petitioner on the merits until July 6, 1987.
23	Jun 22 1987		Order further extending time to file brief of petitioner on the merits until July 20, 1987.
25	Jul 14 1987		Order extending time to file brief of petitioner on the merits until July 24, 1987.
26	Jul 24 1987		Brief amicus curiae of SEC filed.
27	Jul 24 1987		Brief of petitioners Billy Pinter, et al. filed.
28	Jul 24 1987		Joint appendix filed.
29	Aug 4 1987	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
30	Aug 13 1987		Brief of petitioners Billy Pinter, et al. filed.
32	Sep 3 1987		Order extending time to file brief of respondent on the merits until October 13, 1987.
33	Sep 21 1987		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided

. 86-805-CFX

try	Date	Note	Proceedings and Orders
			argument GRANTED.
5	Oct 9 1987		SET FOR ARGUMENT. Wednesday, December 9, 1987. (1st case).
4	Oct 13 1987		Order further extending time to file brief of respondent on the merits until October 28, 1987.
6	Oct 29 1987		Brief of respondents Maurice Dahl, et al. filed.
7	Oct 30 1987		CIRCULATED.
8	Dec 9 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86-805

No.____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BILLY J. "B.J." PINTER, *et al.*, *Petitioners*

v.

MAURICE DAHL, *et al.*, *Respondents*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Dallas, Texas 75201
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Counsel for Petitioners

November 17, 1986

QUESTIONS PRESENTED

Section 12(1) of the Securities Act of 1933 provides for a private right of action against any person who offers or sells a security without benefit of registration through use of the mails or interstate commerce.

The questions presented are:

1. Whether the long-established definition of a §12(1) "seller" should be modified to incorporate a new threshold requirement that the "seller" must be motivated by a desire to receive a financial benefit for his efforts in order to be held responsible for his conduct.

2. Whether the common law *in pari delicto* defense is available in a private action for rescission of the sale of unregistered securities brought under §12(1).

LIST OF THE PARTIES

Pursuant to Rule 21.1(b) the following is a list of all parties to the proceeding below. The parties before this Court are identical.

Petitioners

a. Billy "B.J." Pinter
b. Black Gold Oil Company
c. Pinter Energy Company
d. Pinter Oil Company

Respondents

a. Maurice Dahl
b. Gary Clark
c. W. Grantham
d. Robert Daniele
e. Charles Dahl
f. Dowayne Bockman
g. Ray Dilbeck
h. Richard Koon
i. Art Overgaard
j. Jack Yeager
k. Accra-Tronics Seals Corporation
l. Aaron Heller

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BILLY J. "B.J." PINTER, et al., *Petitioners*

v.

MAURICE DAHL, et al., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Billy J. "B.J." Pinter, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 18, 1986.

OPINIONS BELOW

The panel majority opinion of the Court of Appeals for the Fifth Circuit, filed by Hill, C.J., joined by Reavley, C.J., is reported at 787 F.2d 985, and is reprinted in the Appendix hereto, p. a-1, *infra*. A dissenting opinion was filed by Brown, C.J. ("Panel Dissent").

The opinion of the Court of Appeals on petition for rehearing and suggestion for rehearing *en banc* is reported at 794 F.2d 1016, and is reprinted in the Appendix hereto, p. a-25, *infra*. A dissenting opinion was filed by Jones, C.J.,

joined by Clark, Chief Judge, Gee, Jolly, Higginbotham and Davis, Circuit Judges ("Rehearing Dissent").

The memorandum decision of the United States District Court for the Northern District of Texas (Fish, D. J.) has not been reported. It is reprinted in the appendix hereto, p. a-30, *infra* ("Memorandum Opinion").

JURISDICTION

Respondents brought this suit in the Northern District of Texas invoking federal jurisdiction under 15 U.S.C. §77a, *et seq*. The District Court entered judgment for the respondents on October 3, 1984.

Petitioners appealed and the Fifth Circuit affirmed on April 18, 1986 (Brown, C.J., dissenting). Respondents' Petition for Rehearing and Suggestion for Rehearing En Banc was denied *per curiam* on July 21, 1986, by a vote of 8 to 6. Jones, C.J., joined by Clark, Chief Judge, Gee, Jolly, Higginbotham, and Davis, Circuit Judges, dissented in an opinion.

On October 14, 1986, Mr. Justice White ordered that the time for filing this petition for writ of certiorari be extended to and including November 18, 1986.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

15 U.S.C. §77(l)(1). Any person who — offers or sells a security in violation of section 77e of this title . . . shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income

received thereon, upon the tender of such security, or for damages if he no longer owns the security.

STATEMENT OF THE CASE

Petitioners[1] adopt the statement of the case as contained in the opinion of the Courts below.

In brief summary, this is an action for recovery for the sale of unregistered securities (fractional undivided interests in oil and gas leases). Dahl, a veteran of two failed oil and gas ventures, aggressively sought out additional oil and gas properties for investment, and after an extensive search settled on some leases held by Pinter. After touring the property several times on his own, talking with drillers, engineers and others to "get a feel for the properties" and looking at the geology, drilling logs and production history assembled by Pinter, he concluded there was "no way he could lose." (Memorandum Opinion, ¶ 10; p. a-32, *infra*.)

Dahl relied upon his own investigation and observations, rather than upon any representation by Pinter, in making his decision to purchase. (*Id.*, ¶ 25; p. a-35,*infra*.) He then became so "enthusiastic" that he "solicited" or caused the remaining respondents to purchase (*id.*, ¶¶ 11, 24, 25; p. a-32, a-34, a-35, *infra*), all but one of whom dealt exclusively with Dahl. (*Id.*, ¶ 20; p. a-34, *infra*.) Dahl knew that the securities in question were being sold without benefit of registration. (p. a-5,*infra*.) See

All of the respondent purchasers decided to invest because of Dahl's "bell-cow role," rather than because of any representation by Pinter. (*Id.*, ¶ 26; See p. a-35, *infra*.) Although Dahl received no commissions, he did receive a partial credit

[1] Hereinafter collectively referred to as "Pinter".

against his purchase price for interests in certain wells. (*Id.*, ¶¶ 21-23; p. a-34, *infra.*)

The respondents' interests ultimately proved worthless and they sought relief from Pinter asserting, *inter alia*, claims under §12(1) of the Securities Act of 1933 ("33 Act") 15 U.S.C. §77(l)(1) and article 33A of the Texas Securities Act, art. 581-33, Texas Ann. Civ. Stat. (Vernon Supp. 1986).

The District Court rejected the respondents' contentions that Pinter engaged in material misrepresentations in connection with the sales but, without discussing the respondents' *in pari delicto* or other common law defenses, found that Pinter's failure to register was unlawful and ordered rescission.

The Fifth Circuit held that Dahl "has a right to recover from Pinter under federal law" (p. a-12, *infra*), rejecting the *in pari delicto* defense. By a vote of 8 to 6, the Fifth Circuit denied Pinter's petition for rehearing and suggestion for rehearing *en banc* (p. a-25, *infra*), from which this appeal was taken.

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit's addition of a "pecuniary benefits" test to the settled definition of a "seller" of unregistered securities conflicts with the decisions of this Court and other Circuits, threatens the effective enforcement of the securities laws and the protection of the investing public.

With absolutely no foundation in either settled securities law or its underlying policies, the Fifth Circuit added a "pecuniary benefits" requirement to the definition of a "seller" of securities in order to avoid finding that Dahl was a "seller" under the statute. Because of the calculated absence of such an requirement in the settled law of the Fifth and

other Circuits, the importance of §12(1) to private and public enforcement of the securities laws and the veneration of the former Fifth Circuit "seller" rule in other Circuits, the effect of this ruling will be to create widespread judicial and administrative confusion on an issue of substantial significance to the day-to-day regulation of the securities industry.

The Fifth Circuit has long held that a "seller" of unregistered securities is one whose conduct was a "substantial factor" in causing the purchase. *Hill York Corp. v. American International Franchises, Inc.*, 448 F.2d 680 (5th Cir. 1971); *Lewis v. Walston & Co.*, 487 F.2d 617 (5th Cir. 1973). As indicated by Judge Jones in her lengthy dissent to the denial of petitioners' suggestion for rehearing *en banc*, in which she was joined by Clark, Chief Judge, Gee, Jolly, Higginbotham, and Davis, Circuit Judges, *Hill York* and *Lewis* have developed a wide following in the lower courts. Rehearing Dissent, p. a-26, *infra*.[2] *Not one* of the opinions cited in the preceding note discusses a pecuniary benefits requirement in the context of liability under §12 of the '33 Act.[3]

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[2]The test announced in *Lewis* and *Hill York*, essentially that of proximate cause, has been routinely followed in cases discussing liability under both §§12(1) and 12(2). *See, e.g., Katz v. Amos Treat & Co.*, 411 F.2d 1046, 1052-53 (2d Cir. 1979); *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 545 F.Supp. 1314, 1353 (S.D.N.Y. 1982); *Penturelli v. Spector Cohen Godon & Rosen P.C.*, 603 F.Supp. 262, 264 (E.D. Pa. 1985); *Lawler v. Gilliam*, 569 F.2d 1283, 1287-88 (4th Cir. 1978); *Securities & Exchange Commission v. Murphy*, 626 F.2d 633 (9th Cir. 1980); *Stokes v. Lokken* , 644 F.2d 779 (8th Cir. 1981); *Davis v. Avco Financial Services, Inc.*, 739 F.2d 1057 (6th Cir. 1984), *cert. denied*, 105 S.Ct. 1359 (1985).

[3]Although the Trial Court found that Dahl received no commission from the sales to the remaining plaintiffs, he held that Dahl "did receive a partial credit against the purchase price paid by him to Pinter . . . for Dahl's purchase of interests" in certain wells (Memorandum Opinion, ¶¶21, 22; p. a-34, *infra*).

In sum, as stated by Judge Brown,

> The Court's determination that a "seller" should include only those whose efforts were intended to benefit themselves in some manner is wholly without support in law and flies in the face of the policy underlying the securities registration laws. Securities law is concerned with the *protection of the public*. The public may be injured (as happened here) by a careless "seller" of unregistered securities whether there is something in it for the seller or not. In other words, it is Dahl's *conduct* that endangered the public regardless of his state of mind. Thus, the majority's weak attempt to distinguish the "substantial factor" cases by pointing out that the "sellers" in those cases had some expectation of financial benefit has no more foundation in securities law and policy than a distinction based upon the color of the seller's hair or the size of his tennis shoes. The opinions which the majority distinguishes do not in any way indicate that financial benefit was a factor in the decision of those cases. The Court in this case is inventing new law that threatens to undermine the protections provided to the public by the securities laws.

Panel Dissent, p. a-18, *infra*. (Emphasis in original.)

Because of its signal importance to the enforcement of the securities laws and the protection of the investing public, this Court should not allow the addition of a "pecuniary benefits" requirement to the settled definition of a "seller".

II.

The ruling by the Court Appeals that the *in pari delicto* defense does not apply to §12(1) cases directly conflicts with the decision of this Court in *B. Eichler, H. Richards, Inc., v. Berner*, 105 S.Ct. 2622 (1985), with decisions of other Circuits and with the effective enforcement of the securities laws and the protection of the investing public.

Judge Edith Jones, writing on behalf of the six Judges who dissented from the denial of Pinter's motion for rehearing *en banc*, made the following statement regarding the panel ma-

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Commonly, one who seeks to invest in a venture wants a sufficient number additional investors along, to capitalize the venture and spread the risk. As pointed out in Judge Brown's dissent (p. a-18, a-19, *infra*),

> The Court's finding that Dahl expected no financial benefit from his efforts has no basis in the record or common sense. More investors means that the investment program receives the requisite amount of financing and a smaller risk to each investor. Therefore, I cannot believe that Dahl was completely free of self-interest when he exhorted other purchasers to invest.
>
> If the threshold test of direct or indirect gain imposed by this Court in *Dirks v. Securities & Exchange Commission*, 463 U.S. 646, 660-62 (1963), may be met by "a reputational benefit that will translate into future earnings" or a "gift of confidential information to a trading relative or friend," *id.*, at 663-64, as cited in *Eichler* at 105 S.Ct. 2629, at n. 21, it is difficult to understand how the Court of Appeals can say that Dahl received no benefit from the transaction. It follows from such a conclusion that "sellers" may attempt to avoid "seller" liability by disguising or denying the financial rewards they receive from their efforts and that one who has an obvious financial interest in the outcome of an investment may successfully contend that he has no interest seeing it successfully financed. These results seriously hinder the primary goal of the securities laws: the protection of the investing public.

jority's refusal to apply the *in pari delicto* defense to the facts at bar:

> The second major divergence between the majority opinion and the dissent is also purely one of law. The majority declines to apply a recent Supreme Court case which, in the context of a private cause of action for a securities violation, fashions an explicit test for allowance of the *in pari delicito* [sic] defense. *See B. Eichler, H. Richard v. Berner,* [sic] 472 U.S. ____, 86 L.Ed. 215, 105 S.Ct. 2622 (1985). Rather, the majority ruled that the disposition of the *in pari delicto* issue raised on this appeal was controlled by a venerable Fifth Circuit case which, as correctly pointed out in the dissent, does not even discuss the *in pari delicto* defense. *[Henderson v. Hayden,* 461 F.2d 1069 (5th Cir. 1972).] The majority's confusion regarding the controlling principles of law is evident in its hapless attempt to distinguish *Eichler* on the grounds that the *Eichler* test "mirrors the classic formulation of the *in pari delicto* doctrine." Finally, the majority apparently suggests that *Eichler* should be confined to section 10(b) actions. *Eichler* does not even remotely suggest such a result. In fact, it was conceded in *Eichler* that the *in pari delicto* defense should be available when Congress expressly provides for private remedies (e.g., actions under the 1933 Securities Act). . . . any reasonable reading of *Eichler* indicates that its formulation of the *in pari delicto* defense applies to actions instituted under the 1933 Act as well as actions brought pursuant to 10b-5.

Rehearing Dissent, p. a-27,-28, *infra.*

On the issue of whether Dahl was a §12(1) "seller", the panel majority admitted his conduct was a "substantial factor" in the sales under the language of *Hill York* and

Lewis — and then refused to find that Dahl was a "seller." See p. a-14, *infra.* On the issue of the application of the *in pari delicto* defense, the panel majority had "no difficulty" admitting that Dahl bore "at least substantially equal responsibility for the violations he seeks to redress," *Eichler, supra,* 105 S.Ct. 2622, at 2629, quoting repeatedly from *Eichler* (See p. a-8, a-12, a-13, a-14, *infra*), and that "If Eichler applies to a section 12(1) action as well as to a section 10(b) action, it appears that *Henderson* is no longer valid precedent." See p. a-8, *infra.* The Court of Appeals nevertheless rejected the application of the *in pari delicto* defense to §12(1) cases. In Judge Brown's words,

> The Court today has reached a result allowing a plaintiff to take refuge in the protections provided by the federal and state securities law even when the plaintiff participates in those violations to an equal or greater extent than the defendant. Because I find this result contrary to settled law and unsound as a matter of securities policy, I must respectfully dissent from the Court's opinion.

Panel Dissent, p. a-15, *infra.*

Three pre-*Eichler* decisions by the United States Supreme Court must be reviewed in order to develop the relationship between the common law defensive concept of *in pari delicto* and the rationales underlying the securities acts. *Securities & Exchange Commission v. Capital Gains Research Bureau,* 375 U.S. 180 (1963); *J. I. Case v. Borak,* 377 U.S. 426 (1964); *Perma Life Mufflers, Inc. v. International Parts Corporation,* 392 U.S. 134 (1968).

In *Capital Gains,* the S.E.C. attempted to compel a registered investment advisor to disclose to his clients his practice of purchasing securities for his own account shortly before recommending them for long term investments, then selling

his shares at a profit. The District Court refused to enter an injunction on the basis that the terms "fraud" and "deceit", as used in the Investment Advisors Act of 1940, were used in their technical common-law sense, thus requiring the elements of proof contained in those common law causes of action. After the Court of Appeals affirmed in a five-four decision, the Supreme Court granted certiorari and reversed, agreeing with the four dissenting judges on the Court of Appeals. Noting that the Act was the last in a series of legislations designed to eliminate abuses in the securities industry, the Supreme Court stated:

> A fundamental purpose, common to these statutes, was to substitute a philosophy of full disclosure for that of *caveat emptor*, and thus to achieve the high standard of business ethics in the securities industry.

375 U.S., at 185-86.

After rejecting the requirement of strict proof of traditional common law elements when to do so would undermine the manifest purpose of the securities laws, the Supreme Court addressed the question whether the '34 Act authorizes a federal cause of action for rescission with respect to a merger authorized pursuant to a fraudulent proxy statement. *J. I. Case v. Borak*, 377 U.S. 426 (1964). In rejecting a strict common law approach, the Court held:

> We . . . believe that . . . it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose . . . It is for the federal courts to adjust their remedies so as to grant the necessary relief where federally secured rights are invaded.

377 U.S., at 432-33.

Finally, in *Perma Life Mufflers, Inc. v. International Parts Corporation*, 392 U.S. 134 (1968), the Supreme Court confronted the issue of the applicability of common law defenses to the strict liability provisions of the anti-trust statutes. *Perma Life* involved a private claim for relief under the anti-trust statutes to which the defendants asserted a defense of *in pari delicto*. Both the District Court and Court of Appeals allowed the defense; the Supreme Court granted certiorari because such rulings "seemed to threaten the effectiveness of the private action as a vital means for enforcing the anti-trust policy of the United States." 392 U.S., at 136. The Court held that "*in pari delicto*, with its complex scope, contents, and effects, should not be formally recognized as a defense to an anti-trust action." *Id.*, at 140. However, the *Perma Life* Court reserved the question whether a plaintiff who engaged in "truly complete involvement and participation in a monopolistic scheme" — one who "aggressively support[ed] and further[ed] the monopolistic scheme as a necessary part and parcel of it" — could be barred from pursuing a damage action. *Ibid.* In separate opinions, five Justices agreed that the concept of equal fault or *in pari delicto* should be narrowly defined in litigation based upon federal regulatory statutes. However, as pointed out and adopted in *Eichler*, where a plaintiff truly bore at least substantially equal responsibility for the violation, a defense based on such fault — whether or not denominated *in pari delicto* — was expressly recognized. *Eichler, supra*, 105 S.Ct. 2622, at 2628 (quoting from *Perma Life, supra*, 392 U.S., at 140).

The Fifth Circuit Court of Appeals used the precise language of *Perma Life*, adopted in *Eichler*, to define Dahl's involvement in the instant transaction — and then refused to apply the *Eichler* test. Respondents respectfully assert that there is no justification whatsoever for this distinction, whether under *Eichler*, *Henderson* or otherwise.

The Eichler Decision

In their complaint alleging *inter alia*, numerous misrepresentations in violation of §10(b) of the Securities Act of 1934 ("'34 Act"), 15 U.S.C. §78j(b), and Rule 10b-5 promulgated thereunder, 17 CFR §240.10b-5 (1984), the *Eichler* plaintiffs admitted that they knowingly traded on the basis of material inside information. The District Court dismissed, reasoning that the complaint established that the plaintiffs had violated the "particular statutory provision under which recovery is sought." 105 S.Ct., at 2625. The Court of Appeals for the Ninth Circuit reversed, holding that "securities professionals and those who have allegedly engaged in fraud should not be permitted to invoke the *in pari delicto* doctrine to shield themselves from the consequences of their fraudulent misrepresentation." *Berner v. Lazarro*, 730 F.2d 1339, 1320 (9th Cir. 1984).

The Supreme Court reversed and remanded the case for further inquiry. Writing for seven of the eight participating Justices who concurred in the Court's decision, Mr. Justice Brennan rejected the argument that common law defenses were inappropriate in the context of an implied private right of action under the federal securities laws. The Court noted that in most cases, a tippee would be less culpable than a tipper because the tippee's liability would be derivative of that of the tipper. The Court refused, however, to hold that the defense would never be available to a tipper asserting it against a tippee, and found that an implied private right of

action under §10(b) might be barred by conduct *in pari delicto* under the following circumstances:

> (1) [Where] as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress; and
>
> (2) Preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public.

105 S.Ct., at 2629.

The Henderson Decision

In *Henderson v. Hayden*, 461 F.2d 1069 (5th Cir. 1972), the Fifth Circuit allowed a plaintiff to rescind the purchase of securities sold without benefit of registration despite the fact that the plaintiff was a sophisticated investor and was aware that the securities were unregistered when purchased.

The plaintiff's conduct in *Henderson* was not a causative factor in the sale of unregistered securities, nor did the defendants attempt to assert any common law defenses against him. There was no discussion of *in pari delicto*, unclean hands or comparative culpability. Nevertheless, the panel majority in the instant case held that the facts contained in *Henderson* were "in every material respect, indistinguishable from the facts of the case at bar." See p. a-8, *infra*.

Eichler, Henderson, and the Case at Bar

In the first place, *Eichler* does not limit application of the *in pari delicto* defense to 10b-5 cases, but rather implies that the defense would be available against express private causes of action. Secondly, neither *Eichler* nor *Henderson* asserts that the conduct of a co-violator must be "offensive to the dictates of natural justice" in order to warrant invoking the defense.

Thirdly, neither case suggests or implies that a threshold showing of intent or awareness of wrongdoing on the part of a responsible party must be made. Nevertheless, these factors formed the stated basis for the Fifth Circuit's reliance upon *Henderson* in denying the defense as against equally responsible "sellers" in §12(1) cases.

The panel majority excused Dahl's sales of unregistered securities because of his presumed lack of awareness of the *duty to register*. Judge Hill presented this rationale in the following manner:

> Pinter is liable [under §12(1)] notwithstanding the fact that it [sic] probably misapprehended its duty to register. Dahl, also unaware of Pinter's duty to register, was as "culpable" as Pinter in the sense that his conduct was an equal producing cause of the illegal transaction, *in short, in the sense that he was equally non-culpable*. Causation, however, does not create unclean hands nor does equal causation constitute equal fault. Absent a showing that Dahl's conduct was "offensive to the dictates of natural justice," *Keystone Driller*, 290 U.S. at 25, the *in pari delicto* and unclean hands [sic] are not available.

Id., p. a-9, *infra*. (Emphasis supplied.)

This "offensive conduct" requirement is in direct conflict with the recognized meaning of the term, *in pari delicto*, i.e., of *equal or mutual* fault, *id.*, as well as with the application of the doctrine as formulated in *Eichler*.

Returning to the comments of Judge Brown,

> . . . the majority has declined to apply recent Supreme Court precedent which is directly on point — there is absolutely nothing in *Eichler* which indicates that the general *in pari delicto* rules espoused therein are limited

> to a §10b action, as the majority of this panel apparently implies. Instead, this Court finds that the controlling precedent for this *in pari delicto* appeal is found in a 1972 Fifth Circuit case which is not even an *in pari delicto* case. . . .
>
> * * *
>
> . . . Dahl is as responsible as Pinter (probably more so) . . .

Panel Dissent, p. a-21, a-22, *infra*.[4]

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[4] As pointed out by Judge Brown, "there are many problems with the majority's reasoning in its effort to apply *Henderson* instead of *Eichler*." (Appendix, p. a-21, at n.4). In addition to the problems discussed in relative detail in this petition, these include at least the following:

(a) treatment of Pinter's affirmative defense as "some generic form of 'estoppel theory' rather than as an *in pari delicto* defense;" (*ibid.*);

(b) failure to recognize that the instant case is one in which, in the words of the panel majority itself, "damages [are sought to] be barred on the grounds of the plaintiff's own culpability;" (Appendix, p. a-10);

(c) apparent confusion regarding the fact that knowledge of the need for, or absence of, registration is irrelevent to a claim asserted under §12(1);

(d) improper application of direct Texas precedent making one who knowingly purchases unregistered securities equally culpable and therefore, *in pari delicto* under the Texas statute proscribing the sale of unregistered securities, i.e., *Ladd v. Knowles*, 505 S.W.2d 662, 668 (Tex. Civ. App. 1974); and

(e) apparent or implied rejection of the second prong of the *Eichler* test, i.e., authorizing preclusion of suit where the purpose of the securities laws would not be frustrated, and substituting in its place the requirement that suit be precluded only where preclusion would *further* the purpose of the securities laws.

Respondents would respectfully assert that Dahl's culpable §12(1) conduct mandates application of the *in pari delicto* defense, as set forth in *Eichler*. In attempting to limit the defense unnecessarily, the Court of Appeals has created an artificial distinction between the application of *Eichler* to '34 and '33 Act violations, has appended a "pecuniary benefits" test to the settled definition of a §12(1) "seller" and has invited the addition of an "offensive conduct" element as a prerequisite to liability under an absolute liability statute. If allowed to stand, this decision will result in inequity between parties litigating securities claims, will create substantial judicial confusion on issues impacting the daily regulation of the securities industry, will exacerbate conflicts in the lower courts, and will significantly undermine the regulatory purpose of the securities laws.

a. Denying application of the *in pari delicto* defense will promote inequities between litigants in private securities actions brought under §12(1).

For whatever reason, the remaining plaintiffs did not choose to bring an action against Dahl. Absent application of the *in pari delicto* defense, Dahl has thus successfully avoided liability for the sales of unregistered securities which he made to the remaining plaintiffs in violation of §12(1). Neither winning the race to the courthouse nor having a close relationship with other potential litigants should allow an equally culpable party to avoid responsibility for his unlawful conduct.

The motives behind a decision on the part of private litigants to effectively grant informal immunity from private prosecution to one who has violated the spirit and letter of the securities laws should not be assumed to be appropriate. The power to designate immunity from a regulatory frame-

work intended to protect the public should not be left to private litigants in view of its deterrent and compensatory purposes. The need for full and fair disclosure, protection of the investing public and full compensation of the victims of such violations dictates a more homogeneous result.

b. Denying the *in pari delicto* defense will produce confusion in the lower courts.

The decision to deny the *in pari delicto* defense in the face of the Supreme Court's opinion in *Eichler* has already produced substantial confusion, as six judges on the Fifth Circuit have noted, speaking through Judge Jones:

> . . . in light of the panel majority's cloudy discussion of the *in pari delicto* doctrine, I am left wondering about the doctine's current place in this Circuit's law. Are we really holding that the *Eichler* formulation of the *in pari delicto* doctrine does not apply to actions arising under the 1933 Act? Do we have any valid rationale for doing so? If not, on what basis are we to decide whether to apply *Eichler* in future cases? Reshaping the law in order to reach a predetermined desired outcome has created an ill-conceived precedent on two significant legal issues affecting securities litigation.

Rehearing Dissent, p. a-28, *infra*.

c. Denying the *in pari delicto* defense will result in increased conflicts in the securities litigation decisions of the lower courts.

As the Supreme Court has recognized, the "lower courts have divided over the proper scope of the *in pari delicto* defense in securities litigation." *Eichler*, 105 S. Ct., 2626 at n. 10 (numerous citations omitted). The decision under discussion can only exacerbate the significant conflicts which

already exist between the circuits as to the treatment of equitable defenses in §12(1) cases and securities cases in general.

d. Denying the defense threatens the enforcement of the securities laws and protection of the investment public.

The second prong of the *Eichler* test recognized the propriety of denying rescission to a plaintiff where preclusion of suit would not frustrate the purpose of the securities laws. *Eichler*, 105 Sup. Ct., at 2629 (1985). *Accord: Woolf v. S.D. Cohn & Co.*, 515 F.2d 591, 602-03 (5th Cir. 1975), *vacated and remanded on other grounds*, 426 U.S. 944 (1976). The policy in favor of strong securities laws and protection of the investment public which underlies the second prong of *Eichler* will be undermined, rather than enhanced, by the rule under discussion.

In defense of its decision to reject *Eichler* and apply *Henderson*, the Court of Appeals outlines the development of the *in pari delicto* doctrine in the courts of equity. Concluding that Dahl or other §12(1) defendants who engage in the sale of unregistered securities could not be *in pari delicto* because not "culpable," and not culpable because not aware of the *necessity* of registration, the Court of Appeals rejected the defense. See p. a-9, a-10, *infra*. Judge Brown characterized this argument as an "invention." Panel Dissent, p. a-18, *infra*. Knowledge of the need for registration should play no part in finding a §12(1) violation, which makes the sale of unregistered securities unlawful *per se*. *See, e.g., Swenson v. Engelstad*, 626 F.2d 421, 424 (5th Cir. 1980). To hold otherwise in the context of an equally culpable party is to weaken the statutory scheme, as shown by the self-contradictory phraseology contained in the panel majority's opinion:

> ...We believe that a rule imposing liability (without fault or knowledge) on friends and family members who give one another gratuitous advice on investment matters unreasonably interferes with well established patterns of social discourse ... *we decline to impose liability for mere gregariousness.*

See p. a-14, *infra*. (Emphasis added.) *Per contra*, if "mere gregariousness" proximately causes the purchase, the courts have long held, and the statute provides, that such conduct is actionable. To hold otherwise can only emasculate the law.

e. Failure to subject equally culpable parties to equal liability reduces the likelihood of a successful recovery on the part of members of the injured public.

The Court of Appeals also holds that a defendant in a §12(1) case should not be entitled to contribution from a plaintiff whose conduct was an equal producing cause for the sale. However, as seven judges recognized, holding equally responsible parties liable for their conduct by applying the *in pari delicto* defense in § 12(1) cases will prevent the artificial or arbitrary immunization of potential defendants, with beneficial results:

> Barring Dahl's recovery will not let Pinter off the hook because of the presence of the other plaintiffs who have already successfully litigated their claims against Pinter. Thus, allowing the *in pari delicto* defense to be used in this case results in the best possible outcome — both Dahl and Pinter must "pay" — that is, bear the burden — for the violation for which they are both responsible. The best way to protect the public in this case is to

discourage the actions of both Dahl and Pinter as well as future Dahls and Pinters.

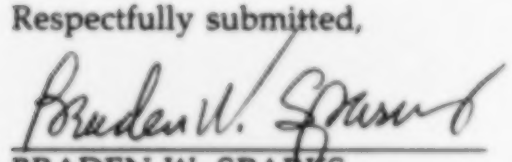
> Indeed, I would go further. I would hold that Pinter is entitled to a contribution from Dahl since Dahl is at least equally culpable for the sale to the other plaintiffs.

Panel Dissent, p. a-23, *infra; cf.*, Rehearing Dissent, p. a-26, *infra*. Contribution would have been available to Pinter had the other investors brought an action against Dahl. Their failure to do so should not prevent this result.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,



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November 17, 1986

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MAURICE DAHL, GARY CLARK, W. GRANTHAM, ROBERT DANIELE, CHARLES DAHL, DOWAYNE BOCKMAN, RAY DILBECK, RICHARD KOON, ART OVERGARRD, JACK YEAGER, ACCRA TRONICS SEALS CORP., AND AARON HELLER,

Plaintiffs-Appellees,

v.

BILLY J. "B. J." PINTER, BLACK GOLD OIL COMPANY, PINTER ENERGY COMPANY, AND PINTER OIL COMPANY,

Defendants-Appellants.

No. 84-1970
OPINION

Filed April 18, 1986

Before: John R. Brown, Thomas M. Reavley, and Robert M. Hill, Circuit Judges.

Opinion by Judge Robert M. Hill;
Dissent by Judge John R. Brown

Appeal from the United States District Court
for the Northern District of Texas
A. Joe Fish, District Judge, Presiding

SUMMARY

Securities

Appeal from judgment of liability under section 12 of the Securities Act of 1933, 15 U.S.C. §77(*l*)(1) and article 33A(1)

of the Texas Securities Act, Tex. Rev. Civ. Stat. Ann. art. 581-33A(1) (Vernon Supp. 1986). Affirmed.

Pinter sold unregistered securities (fractional undivided interests in oil and gas leases) to Dahl and Dahl's associates. Dahl had solicited his associates to purchase the securities and knew the interests were being sold without benefit of registration. The interests proved worthless and Dahl and his associates sought recovery from Pinter under the securities laws. Pinter was held liable based on his status as a seller of unregistered securities. Pinter argues that Dahl was also a seller and should therefore be accountable in contribution and should be barred from any personal recovery.

[1] *Henderson v. Hayden*, 461 F.2d 1069 (5th Cir. 1972) held that a plaintiff seeking a return of consideration paid for unregistered securities under section 12(1) could not be estopped by virtue of his having been aware that the securities were unregistered. **[2]** *Henderson*, however, may have been displaced by *B. Eichler, H. Richards, Inc. v. Berner*, 472 U.S. __, 105 S.Ct. 2622, 86 L.Ed.2d 215 (1985), **[3]** which established that under certain circumstances, *in pari delicto* will bar a plaintiff's recovery in a section 10(b) action under the Securities Exchange Act of 1934, 15 U.S.C. §78j(b). **[4]** The *in pari delicto* doctrine refers to willful misconduct rather than to merely negligent conduct. **[5]** Unlike section 10(b), section 12(1) is a strict liability offense. Absent some showing that Dahl's conduct was offensive to the dictates of natural justice, the *in pari delicto* and unclean hands defenses are not available.

[6] It must also be decided whether Pinter may defend on the grounds of estoppel and whether *Eichler* or *Henderson* represents the controlling standard. *Henderson* applies because *Eichler* applies when damages are sought to be barred on the grounds of the plaintiff's own culpability, a condition

not present here. **[7]** The estoppel theory has no independent existence in the principles of judicial integrity but arises exclusively from within the relationships that are regulated by federal statute. The issue, therefore, is whether section 12(1) can be fairly construed as applying only to purchasers who do not know their securities are unregistered. *Henderson*, which posed the question whether allowing plaintiff's suit in accordance with the express provisions of section 12(1) would frustrate the purposes of the Securities Act of 1933, is a sound construction and the failure to allow the asserted equitable defenses was not erroneous.

[8] Under section 12(1), a "seller" is one who parts with title to securities in exchange for consideration or whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place. **[9]** Clearly, Dahl's conduct was a "substantial factor" in causing the other plaintiffs to purchase securities from Pinter. **[10]** However, he is not a "seller" for the purposes of section 12(1) as the substantial factor test was formulated and applied under facts which differ substantially from the facts of this case. Here Dahl did not receive or hope to receive some financial benefit for his efforts. A rule imposing liability without fault or knowledge on friends and family members who give one another gratuitous advice on investment matters unreasonably interferes with well-established patterns of social discourse. Therefore, Dahl is not a seller and not liable for contribution.

The dissent argues that Dahl's conduct gives rise to two theories under which the *in pari delicto* defense operates to bar his recovery under either Texas law or the 1933 Act.

OPINION

ROBERT M. HILL, Circuit Judge:

In this appeal Pinter[1] urges that his liability under section 12(1) of the Securities Act of 1933, 15 U.S.C. §77(*l*)(1), and article 33A(1) of the Texas Securities Act, Tex. Rev. Civ. Stat. Ann. art. 581-33A(1) (Vernon Supp. 1986), should be diminished by plaintiff Maurice Dahl's wrongful conduct. We disagree with this contention and affirm the decision of the district court granting judgment for plaintiffs.

I.

This controversy arises out of the sale of unregistered securities (fractional undivided interests in oil and gas leases) by Pinter to Dahl and to Dahl's associates. Dahl is a California real estate investor who, at the time of his dealings with Pinter, was a veteran of two failed oil and gas ventures. Ever an optimist, Dahl aggressively sought out additional oil and gas properties for investment and after an extensive search settled on some leases held by Pinter. Dahl toured the property several times, frequently without Pinter, so that he could talk to others and "get a feel for the properties." After looking at the geology, drilling logs, and production history assembled by Pinter, he concluded that there was no way he could lose.

Dahl was so enthusiastic about Pinter's leases that he told plaintiff Wendy Grantham and the ten other plaintiffs, all of

[1] The defendants-appellants are Billy J. Pinter, individually and d/b/a/ Black Gold Oil Co., Pinter Energy Co., and Pinter Oil Co. Throughout this opinion appellants will be referred to as "Pinter."

whom were either friends or family of Dahl, about the venture. The district court found that with the exception of Grantham who herself conceived the idea to purchase, Dahl "solicited" these friends "in connection with the offer, purchase, and receipt of their oil and gas interests." These solicitations clearly were motivated by Dahl's desire to enrich his friends and family as Dahl received no commission by way of discount or otherwise in connection with the purchases made by any plaintiff.

Each investment letter-contract signed by the purchasers was a form prepared by Pinter. That document contained the following language:

> Whereas the parties constitute a predetermined and limited group of sophisticated and knowledgeable well informed investors who desire to arrange for participation in an oil and/or gas drilling venture as an investment and do declare that it is not for the purpose of reselling their interest therein. (These participating interests are being sold without the benefit of registration under the Securities Act of 1933, as amended, and on reliance of rule 146 thereunder).

Dahl, who helped each of the other plaintiffs complete the letter contracts, knew that the interests were being sold without benefit of registration. There is no evidence, however, that Dahl knew that Pinter's failure to register was in violation of federal and state securities laws.

The plaintiffs' acquired interests ultimately proved worthless and plaintiffs sought relief under section 12(1) of the

Securities Act of 1933[2] and article 33A(1) of the Texas Securities Act.[3]

The district court found that Pinter's failure to register the securities purchased by plaintiffs was unlawful and permitted plaintiffs to recover the purchase price of the unregistered securities plus interest less investment income. Pinter maintains that because of his promotional activities Dahl, too, is liable as a "seller" of unregistered securities under section 12(1) and article 33A(1) and thus should be accountable to Pinter in contribution for the amounts awarded to the other plaintiffs. Further, Pinter argues that Dahl should be barred from any personal recovery from Pinter under the

[2] Section 12(1) provides:

> Any person who — offers or sells a security in violation of section 77e of this title ... shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

15 U.S.C. §77e. Title 15 U.S.C. §77e provides, in pertinent part, that if a security is unregistered it is unlawful for a person, directly or indirectly, to use the mails to sell or deliver the security.

[3] Article 33A(1) provides:

> A person who offers or sells a security in violation of Section 7, 9 (or a requirement of the Commissioner thereunder), 12, 23B, or an order under 23A of this Act is liable to the person buying the security from him, who may sue either at law or in equity for rescission or for damages if the buyer no longer owns the security.

Texas Ann. Civ. Stat. art. 581-33 (Vernon Supp. 1986).

equitable doctrines of *in pari delicto*, estoppel and unclean hands.

II.

A. *Availability of Equitable Defenses*

[1] In *Henderson v. Hayden*, 461 F.2d 1069 (5th Cir. 1972), this court determined that a plaintiff seeking a return of consideration paid for unregistered securities under section 12(1) could not be estopped by virtue of his having been aware that the securities were unregistered.

> We cannot say that in the present appeal rescission would frustrate the Act's purpose. While one of the essential purposes of the Act is to protect innocent purchasers of securities ... and though [plaintiff] is certainly not the average innocent investor,[4] nevertheless, allowing him to recover clearly will not frustrate the legislative purpose.... Congress sought to encourage sellers of securities to register those securities prior to any sales or offers to sell. By allowing recoveries such as the one in this case unregistered sales are discouraged. Thus it is apparent that [plaintiff] may recover from [defendants].

461 F.2d at 1072 (footnote added). The plaintiff in *Henderson* was at least as sophisticated a buyer as Dahl. His state of awareness regarding the seller's failure to register was, as far as we can tell, identical to Dahl's. There is no evidence indicating that Dahl bought the securities knowing that Pinter's failure to register violated federal statute.

[4] Plaintiff was a highly sophisticated and successful investor who devoted his full time to managing his investment portfolio.

[2] The facts of *Henderson* are, in every material respect, indistinguishable from the facts of the cast at bar. We forestall reliance on *Henderson* as controlling precedent, however, pending a determination whether it has been displaced by a recent Supreme Court Case, *B. Eichler, H. Richards, Inc. v. Berner*, 472 U.S. __, 105 S.Ct. 2622, 86 L.Ed. 2d 215 (1985).

[3] In *Eichler* the Supreme Court established that the doctrine of *in pari delicto* will bar a plaintiff's recovery in a section 10(b) action under the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), when:

> (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and
>
> (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investment public.

Id. at __, 105 S.Ct. at 2629, 86 L.Ed. at 224. Unlike the standard employed in *Henderson* which focuses on whether preclusion of suit would further the goals of securities legislation, the *Eichler* test queries whether preclusion of suit would interfere with enforcement of the legislation. If *Eichler* applies to a section 12(1) action as well as to a section 10(b) action, it appears that *Henderson* would no longer be valid precedent.

[4] The *in pari delicto* doctrine eminates from the Latin expression, "*in pari delicto est conditio defendentis*(In a case of equal or mutual fault . . . the position of the [defending party] is the better one)."[5] The doctrine is a corollary of the unclean hands maxim, the principal difference being that the *in pari delicto* doctrine technically applies only when the plaintiff's fault is substantially equal to the defendants. Not

[5] Black's Law Dictionary 711 (5th ed. 1979).

any act suffices to bring into play the doctrines of *in pari delicto* and unclean hands. As the Supreme Court points out in *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240 (1933), the doctrines apply "only where some *unconscionable* act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation." *Id.* at 245 (emphasis supplied). The unclean hands and *in pari delicto* maxims operate against conduct which is contrary to the dictates of good conscience or fair dealing. 2 Pomeroy, *Equity Jurisprudence*, 92-94 (5th ed. 1941); *United States v. Second National Bank of North Miami*, 502 F.2d 535, 548 (5th Cir. 1974), *cert. denied*, 421 U.S. 912 (1975); *Deseret Apartments v. United States*, 250 F.2d 457 (10th Cir. 1957); *see also United States v. T-12 Garden Apartments*, 703 F.2d 900 (5th Cir. 1983). Moreover, the maxims refer "to willful misconduct rather than to merely negligent conduct. The improper conduct which falls within the maxim must involve intention as opposed to an inadvertent act or a misapprehension of legal rights; the conduct must be morally reprehensible as to known facts." 30 C.J.S. *Equity* §95, at 1022 (1965); (citations omitted); *Preload Technology, Inc. v. A.B. & J. Construction Co.*, 696 F.2d 1080 (5th Cir. 1983).

[5] Unlike section 10(b) which contains an element of scienter, section 12(1) is a strict liability offense. *Swenson v. Engelstad*, 626 F.2d 421, 424 (5th cir. 1980). Pinter is liable thereunder notwithstanding the fact that it probably misapprehended its duty to register. Dahl, also unaware of Pinter's duty to register, was as "culpable" as Pinter in the sense that his conduct was an equal producing cause of the illegal transaction, in short, in the sense that he was equally non-culpable. Causation, however, does not create unclean hands nor does equal causation constitute equal fault. Absent a showing that Dahl's conduct was "offensive to the dictates

of natural justice," *Keystone Driller*, 290 U.S. at 25, the *in pari delicto* and unclean hands are not available.

[6] Remaining to be decided is whether Pinter may defend on grounds of estoppel, and in this regard whether *Eichler*, precluding suit when preclusion would not interfere with the enforcement of the securities laws, or *Henderson*, precluding suit only when preclusion would further the goals of the securities laws, is the governing standard. We believe that *Henderson* supplies the appropriate standard and, thus, the controlling authority in this case.[6] By its own terms, the *Eichler* standard applies when "damages [are sought to] be barred on the grounds of the plaintiff's own culpability," a condition not present under our facts. *Eichler*, 472 U.S. at __, 105 S.Ct. at 2629, 86 L.Ed. at 224. Additional evidence of *Eichler's* limited applicability lies in the fact that the second prong of *Eichler* substantially mirrors the classic formulation of the *in pari delicto* doctrine. As the Court explains, "[t]he defense is grounded on two premises: first, that courts should

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[6]Even if we were to apply the *Eichler* standard, Dahl would still be permitted to recover under section 12(1). In *Eichler* a tippee who voluntarily and, under the facts assumed by the Supreme Court, knowingly traded on inside information was permitted to go forward with his section 10(b) suit against the tipper. First, the Court found that barring private actions in cases such as this would "inexorably result in a number of fraudulent practices going undetected by the authorities and unremedied." 472 U.S. at __, 105 S.Ct. at 2631, 86 L.Ed.2d at 227. Second, the Court reasoned that defendants would be more responsive to the deterrent pressure of potential sanctions because they made the first step in the chain of dissemination and were also more likely to be advised by counsel. We believe that the *Eichler* Court's analysis applies with equal force to the case at bar. We also note that allowing section 12(1) suits for rescission when the plaintiff is unaware that the securities are unregistered in violation of federal law is unlikely to induce plaintiffs to enter into illegal transactions.

not lend their good offices to mediating disputes among wrongdoers; and second, that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality." *Id.* at __, 105 S.Ct. at 2625-26, 86 L.Ed. at 221-22. Traditionally, the *in pari delicto* has been precluded where "there may be on the part of the court itself a necessity of supporting the public interests or public policy in many cases, however reprehensible the acts of the parties may be." 1 J. Story, *Equity Jurisprudence* 305 (13th ed. 1886), *quoted in Eichler*, 472 U.S. at __, 105 S.Ct. at 2627, 86 L.Ed.2d at 222. A plaintiff with unclean hands, in essence, must overcome a presumption that entertainment of his suit would not serve the public interest; and, in accordance with this principle, *Eichler* permits the application of the *in pari delicto* doctrine in the context of securities regulation when "preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public." *Eichler*, 472 U.S. at __, 105 S.Ct. at __, 86 L.Ed.2d at 224.

[7] The law imposes no such presumption on Dahl. The issue in this case is not how the parties' legal relationship should be structured in order to give maximal effect to the two independent values undergirding the unclean hands doctrine and the federal securities laws. In contrast to the unclean hands and *in pari delicto* defenses, the estoppel theory asserted by Pinter has no independent existence in principles of judicial integrity but arises exclusively from within the relationships that are regulated by federal statute. The issue, then, is simply whether section 12(1), providing for a general right to rescind a sale of securities not registered in compliance with the 1933 Act, may, in the context of federal securities law, be fairly construed as applying only to purchasers who do not know their securities are unregistered. In interpreting the scope of a statutory provision, courts have

developed numerous aids to construction, one being whether an unprovided-for sanction or remedy "further[s] the essential purpose of the enactment." *See A. C. Frost & Co. v. Coeur D'Alene Mines Corp.*, 312 U.S. 43 (1940). We believe that *Henderson*, which posed the question whether allowing plaintiff's suit accordance with the express provisions of section 12(1) would frustrate the purposes of the Securities Act of 1933, is a sound construction and conclude that the district court's failure to allow Pinter's asserted equitable defenses was not erroneous.[7]

Because we find that Dahl has a right to recover from Pinter under federal law, we need not decide whether Pinter's asserted defenses would bar Dahl's recovery under state law.

B. *Availability of Contribution*

In our decision to permit rescission by Dahl, we have relied heavily upon the absence of any evidence indicating that Dahl possessed knowledge of the illegality of Pinter's failure to register. We reiterate, however, that this fact is irrelevant in

[7] In deciding this issue adversely to Pinter we have not lost sight of the fact that Dahl was involved in solicitations of sales to the remaining plaintiffs. We find in the second part of this opinion, however, that these solicitations were not wrongful; they cannot, therefore, give rise to the defenses asserted by Pinter. Moreover, even if these solicitations were wrongful we fail to discern how Dahl's conduct with respect to sales which were wholly independent of his own purchases from Pinter affect the rationale adopted by this court in *Henderson*. Dahl, after all, is not seeking to recover for Pinter's failure to register the securities it sold to the other plaintiffs. He seeks to recover only the purchase price of his own securities and, with respect to those purchases, Dahl's conduct as a buyer was not wrongful. Dahl had no knowledge that the securities were required to be registered nor was Dahl's purchase of the securities in furtherance of any securities violations against third parties.

deciding whether Dahl is a "seller" of securities.[8] Under section 12(1) the liability of a "seller" of unregistered securities is absolute in the sense that it is not predicated upon knowledge that registration was legally required. *Swenson v. Engelstad*, 626 F.2d 421, 424 (5th Cir. 1980); *Lynn v. Caraway*, 252 F. Supp. 858 (W.D. La. 1966), *aff'd per curiam*, 379 F.2d 943 (5th Cir. 1967), *cert. denied*, 393 U.S. 951 (1986).

[8] A "seller" is (1) one who parts with title to securities in exchange for consideration or (2) one whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place. *Swenson v. Engelstad*, 626 F.2d at 426-27; *Pharo v. Smith*, 621 F.2d 656, 667 (5th Cir. 1980); *Hill York Corp. v. American International Franchises, Inc.*, 448 F.2d 680, 692-93 (5th Cir. 1971).

[9] We have no difficulty finding that Dahl's conduct was a "substantial factor" in causing the other plaintiffs to purchase securities from Pinter. No plaintiff had any familiarity with the Pinter oil and gas interests until contacted by Dahl. Dahl represented to these plaintiffs that based on his own investigations the investments could not lose. And, with

[8] None of the other plaintiffs has sought to recover from Dahl. Dahl's liability on their claims therefore is in issue only if contribution is a remedy available to Pinter. While no code section specifically allows for a right of contribution against a "seller" in Dahl's position, section 16 of the Securities Act of 1933, 15 U.S.C. §77p, provides for "such additional right and remedies that may exist at law or in equity." For the purposes of this analysis, we assume, without deciding, that Pinter is entitled to a right of contribution under federal law. In so doing, we emphasize that this opinion does not stand for the proposition that contribution is an appropriate remedy under these facts. In light of the clear purpose of section 12(1) to disgorge the purchase price from the seller of unregistered securities, we view as unsound any result which would permit Pinter to retain part of the consideration paid by plaintiffs.

the exception of Grantham, the plaintiffs relied exclusively upon communications with Dahl in making their decision to purchase the securities. The district court found, moreover, that all plaintiffs but Grantham "decided to invest because of Dahl's involvement" and that "Dahl, not Pinter, was the person who caused [Grantham] to purchase."

[10] Notwithstanding our conclusion that Dahl meets the substantial factor test, we decline to hold that he is a "seller" for the purposes of section 12(1). The substantial factor test was formulated and has been applied under facts which differ substantially from the facts of this case. In every case we have found employing this test (or its substantial equivalent), the person sought to be held liable as a "seller" received or hoped to receive some financial benefit from his efforts. *See, e.g., Junker v. Crory,* 650 F.2d 1349 (5th Cir. 1981) (corporate attorney acting in capacity as agent of seller); *Croy v. Campbell,* 624 F.2d 709 (5th Cir. 1980) (attorney-accountant who was paid for investment advice); *Lewis v. Walston & Co.,* 487 F.2d 617 (5th Cir. 1973) (investment broker); *Hill York Corp.,* 448 F.2d 680 (compensated agents of the issuer). We believe that had this circuit previously been confronted with a promoter of unregistered securities whose efforts were intended to benefit neither the seller nor himself, we would have created a different test. That test would have incorporated a threshold requirement that the promoter be motivated by a desire to confer a direct or indirect benefit on someone other than the person he has advised to purchase. We believe that a rule imposing liability (without fault or knowledge) on friends and family members who give one another gratuitous advice on investment matters unreasonably interferes with well-established patterns of social discourse. Absent express direction by Congress, we decline to impose liability for mere gregariousness.

As for Pinter's argument that Dahl is a "seller" under Texas securities law, we find that Texas' test for liability is substantially in accord with that which we adopt today in the federal arena. In *Stone v. Enstam,* 541 S.W.2d 473 (Tex. Civ. Appl. — Dallas 1976, no writ), the Texas Court of Civil Appeals found that an individual who, without benefit to himself, "volunteered" to find someone who would sell stock to a prospective buyer, was not a "seller" within the meaning of article 33A. Dahl was clearly no more than a "volunteer" and therefore is not liable under Texas law to the other plaintiffs.

There being no liability under either federal or state law upon which a right of contribution in favor of Pinter may be predicated, we find that the district court's refusal to assess damages against Dahl was correct.

AFFIRMED.

JOHN R. BROWN, Circuit Judge, dissenting.

The Court today has reached a result allowing a plaintiff to take refuge in the protections provided by federal and state securities law even when the plaintiff participates in those violations to an equal or greater extent than the defendant. Because I find this result contrary to settled law and unsound as a matter of securities policy, I must respectfully dissent from the Court's opinion.

It is settled law that a securities case plaintiff may be denied recovery on the basis of the *in pari delicto* defense. *B. Eichler, H. Richards, Inc. v. Berner,* 472 U.S. ___, 86 L.Ed.2d 215, 105 S.Ct. 2622 (1985); *Kuehnert v. Texstar Corp.,* 412 F.2d 700 (5th Cir. 1969). In *Eichler* the Supreme Court ruled that a private action for damages under the federal securities laws may be barred on the grounds of the plaintiff's own culpabil-

ity where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public. *Eichler*, 472 U.S. at ___, 86 L.Ed.2d at 224, 105 S.Ct. at 2629.

Dahl's conduct in this case gives rise to two theories under which the *in pari delicto* defense operates to bar his recovery under either Texas law or the 1933 Act. First, Dahl's conduct in exhorting the other plaintiffs to invest transformed him into a "seller" of unregistered securities. In other words, his conduct put him in the same boat as Pinter, from whom Dahl is attempting to recover in this case. Second, in addition to "selling" unregistered securities, Dahl knowingly purchased unregistered securities from Pinter. In fact, Dahl was the primary mover — the "catalyst" — even with respect to his own purchases.[1]

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[1] With respect to either of these two theories, whether or not Dahl also knew of the *illegality* of selling unregistered securities — which the majority apparently considers to be of some importance — is irrelevant. Knowledge of illegality plays no part in §12(1) liability for "selling" unregistered securities. Knowledge that they are not registered is enough. *See Swenson v. Engelstad*, 626 F.2d 421 (5th Cir. 1980).

With respect to the theory that Dahl's knowing purchase raises the *in pari delicto* bar, Texas law provides that a plaintiff's knowing participation in the sale of unregistered securities by *purchasing* makes the plaintiff equally culpable and, therefore, *in pari delicto*. *Ladd v. Knowles*, 505 S.W.2d 662, 668 (Tex. Civ. App. 1974). The Court in *Ladd* makes no mention of an additional requirement that the plaintiff must know of the *illegality* of the transaction. Moreover, the Court has cited no case law which indicates that knowledge of illegality (as opposed to mere knowledge that the securities are unregistered) is necessary. In any event, it is hard for me to believe — on this record — that a sophisticated investor such as

The Fifth Circuit test for determining whether Dahl is a "seller" under §12(1) or §12(2) of the 1933 Act is whether the injury to the plaintiff flows directly and proximately from the actions of Dahl. *See Hill York Corp. v. American International Franchises, Inc.*, 448 F.2d 680, 692-93 (5th Cir. 1971). In applying this test, the Court in *Hill York* ruled that certain persons fell within the letter and spirit of the test because they were the "motivating force" behind the promotion and "did everything but effectuate the actual sale." *Id.* at 693. In *Lewis v. Walston & Co., Inc.*, 487 F.2d 617 (5th Cir. 1973), we again discussed how parties who participate in the negotiations of or arrangements for the sale of unregistered securities "sell" those securities within the meaning of §12(1) of the 1933 Act. The *Lewis* court ruled that the "proximate cause" aspect of the *Hill York* test is satisfied if the alleged seller's actions are a "substantial factor" in bringing about the plaintiff's purchases.

The findings in the present case clearly indicate that Dahl was a "substantial factor" in bringing about the other plaintiff's purchases and is therefore a seller. As the majority opinion correctly recognizes, no plaintiff had any familiarity with the Pinter oil and gas interests until contacted by Dahl, and all but one relied exclusively upon communications with Dahl in deciding to purchase the securities. The District Court even found that it was Dahl and not Pinter who caused the other plaintiffs to purchase. Notwithstanding all these findings as well as the majority's conclusion that Dahl meets the

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Dahl did not know of the illegality of selling unregistered securities. In fact, each investment letter-contract, which Dahl helped the other purchasers complete, contained language expressly indicating that the securities were not registered because of the expected availability of a limited offering exemption from registration. Knowledge of the potential availability of an exemption certainly indicates awareness of the requirements of the securities laws.

substantial factor test, this Court declines to hold that Dahl is a "seller."

The Court's determination that a "seller" should include only those whose efforts were intended to benefit themselves in some manner is wholly without support in law and flies in the face of the policy underlying the securities registration laws. Securities law is concerned with the *protection of the public*. The public may be injured (as happened here) by a careless "seller" of unregistered securities whether there is something in it for the seller or not. In other words, it is Dahl's *conduct* that endangered the public regardless of his state of mind. Thus, the majority's weak attempt to distinguish the "substantial factor" cases by pointing out that the "sellers" in those cases had some expectation of financial benefit has no more foundation in securities law and policy than a distinction based on the color of the seller's hair or the size of his tennis shoes.[2] The opinions which the majority distinguishes do not in any way indicate that financial benefit was a factor in the decision of those cases. The Court in this case is inventing new law that threatens to undermine the protections provided to the public by the securities laws.[3]

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[2] The Court's suggested distinction is further undercut by its own general definition of "seller." According to the Court (and an abundance of Fifth Circuit precedent), a "seller" is (1) one who parts with title to securities in exchange for consideration *or* (2) one whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place. How strange that one part of the definition expressly requires that a seller receive consideration while any mention of consideration is conspicuously absent from the "substantial factor" element of the definition.

[3] Moreover, the Court's finding that Dahl expected no financial benefit from his efforts has no basis in the record or common sense. More investors means that the investment program receives the requisite amount of financing at a smaller risk to each investor.

The Court's concern with imposing liability on friends and family members who give one another gratuitous advice is a herring, red or otherwise. Merely offering advice or informal investment suggestions will rarely meet the "motivating force" or "substantial factor" test thereby transforming an optimistic investor into a "seller." In the situation at hand, Dahl's conduct went far beyond giving gratuitous advice. For all practical purposes he *was* the seller in the literal sense of the word — moreso even than Pinter. Furthermore, *if* a friend or relative's conduct converts him into a "seller" under established law, why shouldn't the purchasers be able to invoke the protection of the securities laws and sue him? They may choose not to, even when the friend's conduct is as aggressive as Dahl's was here. This is their prerogative, but purchasers should at least have the ability to invoke the securities laws, if they so choose, to sue a friend whose conduct was a substantial factor in causing their injury. In most cases, disgruntled friends and relatives of someone like Dahl will probably do exactly what the plaintiffs did here — go after the "issuer" (Pinter). In any event, the issue on this appeal is not whether we should allow a friend or relative to sue Dahl, but whether we should let Dahl recover from Pinter even though Dahl was equally if not more at fault for the securities violations. In my view, we should *not*.

In addition to being a seller of unregistered securities and therefore in the same boat as Pinter, Dahl's status as a knowing purchaser — in fact, his status as a catalyst for the entire transaction — is another basis on which the *in pari delicto* defense operates to bar his recovery. *See Ladd v. Knowles*, 505 S.W.2d 662 (Tex. Civ. App. 1974); *see also Kuehnert v. Texstar Corp.*, 412 F.2d 700, 703 (5th Cir. 1969)

Therefore, I cannot believe that Dahl was completely free of self-interest when he exhorted the other purchasers to invest.

("This is not a case of mere knowledge of another party's wrongdoing, without active participation."); Godfrey, *Plaintiff's Conduct as a Bar to Recovery Under the Securities Acts: In Pari Delicto*, 48 Tex. L. Rev. 181, 192-94 (1969) (recognizing that more than mere knowledge may be required under the federal securities law for the *in pari delicto* defense to bar a purchaser's recovery, but concluding that acting as a catalyst for the violation clearly goes beyond mere knowledge). In *Ladd* the Court expressly held that if transactions are illegal solely because the stock is unregistered, a plaintiff's knowing participation in the sale — for example, by *purchasing* the stock — makes the plaintiff equally culpable with the seller and, therefore, *in pari delicto*. 505 S.W.2d at 668 (emphasis added).

My brethren cite a Fifth Circuit case, *Henderson v. Hayden*, 461 F.2d 1069 (5th Cir. 1972), for the proposition that knowledge that securities are unregistered does not estop a plaintiff from prevailing under §12(1). This is no longer a persuasive case as it does not reflect the current state of *in pari delicto* law. *See B. Eichler, H. Richard, Inc. v. Berner*, 472 U.S.___, 86 L.Ed.2d 215, 105 S.Ct. 2622 (1985). Technically, it is not even an *in pari delicto* case — it just looks like one. The Court in *Henderson* did not even discuss the issue of "equal culpability," the cornerstone of an *in pari delicto* defense. Rather, the decision in *Henderson* was based on a very general policy-oriented principle which stated that a plaintiff should not be allowed rescission under §12(1) if that rescission would frustrate the Act's purpose. 461 F.2d at 1072. Subsequent case law in the Fifth Circuit and the Supreme Court which *specifically* discusses the *in pari delicto* defense declares that the crucial question is not whether *rescission* will frustrate the Act's purposes but whether *denying rescission* will. *B. Eichler, H. Richard, Inc. v. Berner*, 472 U.S.___, 86 L.Ed.2d 215, 224, 105 S.Ct. 2622, 2629 (1985); *Woolf v. S.D. Cohn & Co.*, 515 F.2d 591,

602-05 (5th Cir. 1975), *vacated and remanded on other grounds*, 426 U.S. 944, 96 S.Ct. 3161, 49 L.Ed.2d 1181 (1976). In other words, given that the plaintiff and defendant are equally culpable for the violation, the proper inquiry is whether the Act's purposes will be frustrated by allowing *in pari delicto* to be used as a defense to rescission in a particular case.

The correct formulation of the rule, according to the Supreme Court, is that a private securities action may be barred on the ground of a plaintiff's own culpability where:

(1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and

(2) *preclusion* of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investment public.

B. Eichler, H. Richard, Inc. v. Berner, 472 U.S.___, 86 L.Ed.2d 215, 224, 105 S.Ct. 2622, 2629 (1985) (emphasis added). *Accord Woolf v. S.D. Cohn & Co.*, 515 F.2d 591, 602-03 (5th Cir. 1975), *vacated and remanded on other grounds*, 426 U.S. 944, 96 S.Ct. 3161, 49 L.Ed.2d 1181 (1976). [4]

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[4]There are many problems with the majority's reasoning inits effort to apply *Henderson* instead of *Eichler*. The source of the problems seems to be the majority's treatment of Pinter's affirmative defense as some generic form of "estoppel theory" rather that as an *in pari delicto* defense. The issue in this case — the issue which has been briefed and orally argued — is whether the *in pari delicto* defense bars Dahl's recovery from Pinter. The Court's confusion of the issue is apparent in its argument that *Eichler* is of limited applicability here because the second part of the *Eichler* rule substantially mirrors the classic formulation of the *in pari delicto* doctrine. How does that make *Eichler* inapplicable? The case presently on appeal *is* an *in pari delicto* case and *Eichler is* therefore directly applicable. Perhaps the majority has been forced to

Dahl's conduct in this case fits the test under either the "seller" theory or the "knowing purchaser" theory. Dahl is as responsible as Pinter (probably moreso) with respect to the sales to the other plaintiffs as well as with respect to his own

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reformulate the issue because *Henderson*, on which the majority rests its decision, is *not* an *in pari delicto* case. As I have emphasized, *Henderson* does not even discuss "equal culpability," the cornerstone of an *in pari delicto* defense.

The majority recognizes that *Eichler* applies when "damages [are sought to] be barred on the grounds of the plaintiff's own culpability," but then erroneously concludes that this in not such a case. This is *precisely* such a case. Pinter expressly claims in his brief that Dahl's recovery should be barred because of Dahl's own culpability. Elsewhere in the opinion, the Court admits that Dahl was as "culpable" as Pinter as a producing cause of the illegal transaction. This observation places Dahl squarely within the *Eichler* formulation of the *in pari delicto* doctrine. Under *Eichler*, the first element of the *in pari delicto* defense is that the plaintiff must bear "at least substantially equal responsibility for the violations he seeks to redress." 472 U.S. at ___, 105 S.Ct. at 2629, 86 L.Ed.2d at 224. Dahl bears at least substantially equal responsibility for the securities violations in this case, as the majority recognizes in stating that Dahl was as "culpable" as Pinter as a producing cause of the illegality.

Finally, any application of *in pari delicto* principles in this appeal is incomplete without discussing Dahl's conduct as a "seller" of unregistered securities in addition to his conduct as a knowing purchaser. The majority has discussed the "seller" issue only in the context of contribution, a discussion with which I also take issue elsewhere in my opinion.

In sum, the majority has declined to apply recent Supreme Court precedent which is directly on point — there is absolutely nothing in *Eichler* which indicates that the general *in pari delicto* rules espoused therein are limited to a §10(b) action, as the majority of this panel apparently implies. Instead, this Court finds that the controlling precedent for this *in pari delicto* appeal is found in a 1972 Fifth Circuit case which is not even an *in pari delicto* case.

purchase. Dahl was the prime mover in the sales to the other plaintiffs. The District Court even found that he, and not Pinter, caused all the other plaintiffs to invest. The record also shows that Dahl was the "catalyst" even for his own investment in unregistered securities. He approached Pinter, carefully studied the drilling logs, and wanted in. And, of course, Dahl knew that the securities were unregistered.

Not only was Dahl equally culpable, but the purpose of the securities laws will not be disserved by barring his recovery. In fact, the enforcement of the securities laws and the protection of the public will be promoted. We do not want sophisticated oil and gas investors such as Dahl going around "selling" unregistered securities to less knowledgeable investors. The "public" which we should be concerned about protecting in this case is not Dahl but the less informed people that he pulled into the venture. They should be able to recover from either Dahl or Pinter, but Dahl should be barred from recovering from Pinter. [5]

Fifth Circuit case law also indicates that the securities laws may be flustered if plaintiffs such as Dahl are allowed to put themselves in no-lose situations by virture of their knowledgeable participation in securities violations. *See Kuehnert v. Texstar Corp.*, 412 F.2d 700 (5th Cir. 1969). This is exactly

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[5]Barring Dahl's recovery will not let Pinter off the hook because of the presence of the other plaintiffs who have already successfully litigated their claims against Pinter. Thus, allowing the *in pari delicto* defense to be used in this case results in the best possible outcome — both Dahl and Pinter must "pay" — that is, bear the burden — for the violation for which they are both responsible. The best way to protect the public in this case is to discourage the actions of both Dahl and Pinter as well as future Dahls and Pinters.

Indeed, I would go further. I would hold that Pinter is entitled to contribution from Dahl since Dahl is at least equally culpable for the sale to the other plaintiffs.

what Dahl did when he knowingly purchased unregistered securities — he put himself in a no-lose situation by acquiescing in, and being the catalyst for, a securities law violation. If the investment had paid off, Dahl would be at home counting his money instead of in court suing Pinter. Instead, the investment was a flop and Dahl sought to invoke the protection of the very laws which were violated primarily because of his own conduct. The securities laws were not meant to serve as a safety valve so sophisticated investors such as Dahl can, in the war weary but still vivid phrase, "have their cake and eat it too." Allowing this fence-sitting to occur will encourage securities law violations. Thus, it cannot be said that precluding Dahl's recovery would interfere with the effective enforcement of the securities laws. Quite the contrary, it would promote effective enforcement because it would discourage those who act as a "catalyst" for securities violations in the hope of placing themselves in a no-lose situation.

In a nutshell, I believe that a fair application of the Supreme Court rule in *Eichler* yields a result at odds with the decision handed down today. Dahl bears at least substantially equal responsibility for the violations he seeks to redress, and barring his recovery works no interference with the effective enforcement of the securities laws and the protection of the public. In fact, as I have attempted to show, public protection and effective enforcement would be promoted by finding Dahl's recovery blocked by the *in pari delicto* defense. Therefore, I must respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MAURICE DAHL, GARY CLARK, W. GRANTHAM, ROBERT DANIELE, CHARLES DAHL, DOWAYNE BOCKMAN, RAY DILBECK, RICHARD KOON, ART OVERGARRD, JACK YEAGER, ACCRA TRONICS SEALS CORP., AND AARON HELLER,

Plaintiffs-Appellees,

v.

BILLY J. "B. J." PINTER, BLACK GOLD OIL COMPANY, PINTER ENERGY COMPANY, and PINTER OIL COMPANY,

Defendants-Appellants.

No. 84-1970

OPINION

Filed July 21, 1986

Before: John R. Brown, Thomas M. Reavley, and Robert M. Hill, Circuit Judges.

Per Curiam; Dissent by Judge Edith H. Jones, with whom Clark, Chief Judge, Gee, Jolly, Higginbotham, and Davis, join

Appeal from the United States District Court
for the Northern District of Texas
A. Joe Fish, District Judge, Presiding

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 18, 1986, 5th Cir., 1986, 787 F.2d 985)

OPINION

PER CURIAM:

A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is denied.

Before Clark, Chief Judge, Gee, Rubin, Reavley, Politz, Randall, Johnson, Williams, Garwood, Jolly, Higginbotham, Davis, Hill, and Jones.

EDITH H. JONES, Circuit Judge, with whom Clark, Chief Judge, Gee, Jolly, Higginbotham, and Davis, Circuit Judges, join, dissenting from denial of rehearing en banc:

I must respectfully dissent from the Court's decision denying rehearing en banc. I do not agree that the panel majority and Judge Brown's dissent differ only in application of settled law to the facts. Quite the contrary, the chasm between the majority and dissenting opinions is strictly one of law.

First, the majority opinion changes the law regarding the definition of a "seller" of securities. The long-standing Fifth Circuit test for identifying a "seller" under the 1933 Act is whether the alleged seller's conduct was a "substantial factor" in causing the purchase. *See Hill York Corp. v. American International Franchises, Inc.*, 448 F.2d 680 (5th Cir. 1971); *Lewis v. Walston & Co., Inc.*, 487 F.2d 617 (5th Cir. 1973). This Court's seminal decisions in *Hill York* and *Lewis* have been widely cited and followed by other circuits. *See, e.g., S.E.C. v. Murphy*, 626 F.2d 633 (9th Cir. 1980); *Stokes v. Lokken*, 644 F.2d 779 (8th Cir. 1981); *Davis v. Avco Financial Services, Inc.*, 739 F.2d 1057 (6th Cir. 1984), *cert. denied*, 105 S.Ct. 1359 (1985). The panel majority specifically found that Dahl met the "substantial factor" test, yet declined to hold that he was a "seller," because, according to the majority, Dahl had no

expectation of financial benefit. Until this opinion, expectation of financial benefit played no role — express or implied — in the determination of "seller" status. According to the majority, the test is no longer "substantial factor" but "substantial factor *plus* expectation of financial benefit." As Judge Brown stated in his dissent, this new restriction has absolutely no foundation in either settled securities law or its underlying policies.

I sympathize with the panel's evident concern regarding an overly broad definition of "seller" lest a cocktail conversation should lead to unwarranted liability under section 12(1) of the 1933 Act. Dahl, however, was performing a role far more significant than that of "happy hour investment advisor." The policy behind the "substantial factor" test, unadulterated by the majority's gloss, is fully satisfied by holding Dahl to be a "seller." We need not speculate, therefore, on how a true cocktail conversationalist might defend himself consistent with that test.

The second major divergence between the majority opinion and the dissent is also purely one of law. The majority declines to apply a recent Supreme Court case which, in the context of a private cause of action for a securities violation, fashions an explicit test for allowance of the *in pari delicito* defense. *See B. Eichler, H. Richard v. Berner*, 472 U.S. ___, 86 L.Ed.2d 215, 105 S.Ct. 2622 (1985). Rather, the majority ruled that the disposition of the *in pari delicto* issue raised on this appeal was controlled by a venerable Fifth Circuit case which, as correctly pointed out by the dissent, does not even discuss the *in pari delicto* defense. The majority's confusion regarding the controlling principles of law is evident in its hapless attempt to distinguish *Eichler* on the grounds that the *Eichler* test "mirrors the classic formulation of the *in pari delicto* doctrine." Finally, the majority apparently suggests that *Eichler* should be confined to section 10(b) actions. *Eichler* does

not remotely suggest such a result. In fact, it was conceded in *Eichler* does not remotely suggest such a result. In fact, it was conceded in *Eichler* that the *in pari delicto* defense should be available when Congress expressly provides for private remedies (e.g., actions under the 1933 Securities Act); the issue for decision was whether the defense should be unavailable when the private cause of action is implied (e.g., a Rule 10b-5 action). The Supreme Court rejected this distinction, ruling that the *in pari delicto* doctrine applies to implied causes of action under the federal securities laws as well as to private causes of action expressly provided for by Congress. 86 L.Ed. at 223-24, 105 S.Ct. at 2628. Thus, any reasonable reading of *Eichler* indicates that its formulation of the *in pari delicto* defense applies to actions instituted under the '33 Act as well as actions brought pursuant to 10b-5.

In sum, the panel majority has erred in its choice of controlling legal principles rather than its application of settled law to the facts. The practical implication of its error is obvious. A fence-straddler, such as Dahl, can promote and participate in an illegal sale of unregistered securities and, if the investment does not pay off, turn around and sue the issuer to recover his investment. This lamentable result may actually encourage future violations, thereby thwarting federal securities policy. Finally, in light of the panel majority's cloudy discussion of the *in pari delicto* doctrine, I am left wondering about the doctrine's current place in this Circuit's law. Are we really holding that the *Eichler* formulation of the *in pari delicto* doctrine does not apply to actions arising under the 1933 Act? Do we have any valid rationale for doing so? If not, on what basis are we to decide whether to apply *Eichler* in future cases? Reshaping the law in order to reach a predetermined desired outcome has created an ill-conceived precedent on two significant legal issues affecting securities litigation. Believing that it is our duty to refrain from such

reshaping and to follow the obvious lead of the Supreme Court in *Eichler*, I dissent from the Court's denial of rehearing en banc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MAURICE DAHL, ET AL.,
Plaintiffs,

vs.

BILLY J. "B.J." PINTER, ET AL.,
Defendants.

CIVIL ACTION No.
CA 3-82-1876-G

MEMORANDUM OF DECISION

This case was tried without a jury on May 21-24, June 22, and July 12, 1984. In accordance with Rule 52(a), Fed. R. Civ. P., the court makes the following findings of fact and conclusions of law.

Findings of Fact

1. The matter in controversy arose out of the sale of certain oil and gas interests by defendants to plaintiffs.

2. At the time this suit was filed, all plaintiffs, except Grantham (and possibly Bockman and Maurice Dahl), were citizens of the state of California. Grantham was a citizen of Texas, Bockman a citizen of either California or Great Britain, and Maurice Dahl a citizen of either California or Texas.

3. Defendants were at all relevant times citizens of the state of Texas.

4. Prior to his purchase of the fractional undivided oil and gas interests of which he complains in this suit, plaintiff Maurice Dahl ("Dahl") was engaged in real estate brokerage and investments in the state of California. His net worth

exceeded $1 million and his annual income approached $250,000.

5. Before his involvement with Pinter in this case, Dahl had invested in two other "oil deals." In 1980-81 he formed two closely held corporations, Wrangler Oil Company and Puma Petroleum, Inc., to acquire and hold royalty and working interests in oil and gas properties. Dahl's first experience in the oil and gas business was through Ed Miner, whom he had known in the real estate business. Miner first introduced Dahl to Lone Star Petroleum, with which Dahl placed an investment of about $7,000. Although Dahl was informed at the time that the wells were successful, he never received income from them and later learned that the whole operation was bogus.

6. Miner next proposed that Dahl obtain leases through Puma Petroleum. Miner found two leases, one in Nevada, Oklahoma and the other on an Indian reservation in northern Oklahoma. Dahl never drilled a well on either lease. One expired, and he sold the other for about half its original cost.

7. As a result of these abortive efforts to enter the oil and gas business, Dahl became dissatisfied with Miner. He hired Dean Kirk for the purpose of locating and acquiring oil and gas properties. Through Puma Petroleum, Dahl funded Kirk's rental of office space and other incidental expenditures for several months while Kirk actively searched for oil deals in Texas and Oklahoma in which Dahl could invest.

8. Kirk introduced Dahl to Pinter. Initially, Dahl learned most of what he knew about Pinter from Kirk. Kirk informed Dahl that Pinter was a highly regarded and successful oil and gas operator in Texas and Oklahoma.

9. Apparently impressed by Kirk's comments concerning Pinter, Dahl discussed with Pinter his interest in acquiring oil

and gas properties. Pinter initially said he could acquire leases for Dahl in November or December of 1980 but that he was obligated to other investors. Dahl gave Pinter $20,000 to acquire leases upon the understanding that the leases were to be held in Black Gold's name, with Dahl having a right of first refusal to drill one or more offset wells in the future.

10. Dahl toured the properties several times, frequently without Pinter, so that he could talk to others and "get a feel for the properties." After looking at the geology, drilling logs, and production history assembled by Pinter, he concluded that there was no way to lose.

11. Dahl was so enthusiastic about Pinter's leases that he told Grantham and the other plaintiffs, all of whom were either friends or family of Dahl, about the venture. Grantham acquired her interests because Dahl was acquiring interests in the same properties, despite the fact that Dahl had warned her of the risks inherent in the oil and gas business. All of the other plaintiffs dealt only with Dahl, not Pinter, and decided to invest because of Dahl's involvement.

12. In the spring of 1981, defendant B.J. Pinter individually and d/b/a/ Black Gold Oil Company, offered, sold and delivered an undivided fractional working interest in and to oil and gas rights in and under the Antwine 2-C well and the Doss 3-B well (and related leasehold areas) to the following plaintiffs, for the sums stated:

Purchaser	Working Interest Purchased	Name of Lease/well	Total Purchase Price
Accra Tronics Seals Corp.	1/32nd	Antwine 2-C	$7,480
Gary Clark	1/32nd	Antwine 2-C	7,480
Robert Danielle	1/32nd	Antwine 2-C	7,480
Charles Dahl	1/32nd	Antwine 2-C	7,480
Dowayne C. Bockman	1/32nd	Antwine 2-C	7,480
Ray Dilbeck	1/32nd	Antwine 2-C	7,480
Richard Koon	1/32nd	Antwine 2-C	7,480

Purchaser	Working Interest Purchased	Name of Lease/well	Total Purchase Price
Art Overgaard	1/32nd	Antwine 2-C	7,480
Jack Yeager	1/32nd	Antwine 2-C	7,480
Wendy Grantham	1/64th	Antwine 2-C	3,740
Aaron Heller	1/32nd	Doss 3-B	7,150
Wendy Grantham	1/64th	Doss 3-B	3,525

13. Defendant B.J. Pinter, individually and d/b/a/ Black Gold Oil Company, offered, sold and delivered to Dahl fractional undivided interests in and to oil and gas rights in and under the hereinafter identified wells and related leasehold areas, for the sums stated:

Antwine 1-C	1/64ths working interest	$ 18,700
Doss 3-B	7/64ths working interest	25,025
Emanuel Clark 1-B	1/8ths working interest	57,500
Walter Clark 1-C	1/8ths working interest	101,000
F.B. Watkins 1-A	1/8ths working interest	93,500
Emanuel and Walter Clark	1/16th overriding royalty	15,000

14. The U.S. mails and instrumentalities of interstate commerce were utilized in the offer, sale and delivery after sale of these fractional undivided interests.

15. The interests offered and sold to the above purchasers constituted fractional undivided interests in oil, gas and other minerals.

16. Such interests offered and sold constituted "securities" within the meaning of the Securities Act of 1933, the Securities Exchange Act of 1934, the Texas Securities Act, and the California Corporate Securities Act of 1968.

17. The fractional undivided oil and gas interests involved in this suit were never registered with the Securities and Exchange Commission.

18. The fractional undivided oil and gas interests involved in this suit were never registered with the Texas Securities Board.

19. The fractional undivided oil and gas interests involved in this suit were never registered pursuant to Section 25110 of the California Corporate Securities Law of 1968.

20. Neither Pinter nor the other defendants had any oral conversations or personal meetings with the California plaintiffs prior to their investment in the identified fractional undivided working interests. All communications and meetings before such sales and purchases were between Pinter and Dahl and/or Wendy Grantham.

21. Dahl did not receive from defendants any commission, by way of discount or otherwise, in connection with the purchase by any plaintiff of the fractional undivided oil and gas interests involved in this suit.

22. Dahl did receive a partial credit against the purchase price paid by him to Pinter d/b/a Black Gold for Dahl's purchase of interests in the Doss 3-B and Antwine 2-C wells. This credit resulted from sums owed to Dahl by Pinter and/or Black Gold.

23. Grantham did not directly receive, nor indirectly receive through Dahl, any commission from defendants in connection with the offer, sale, and delivery to the other plaintiffs of the securities involved in this suit.

24. Dahl solicited each of the other plaintiffs (save perhaps Grantham) in connection with the offer, purchase, and receipt of their oil and gas interests. Grantham apparently asked to purchase an interest after she heard of the interests from or through Dahl.

25. With respect to all plaintiffs except Dahl and Grantham, no evidence established any act or omission on the part of Pinter (or the other defendants), actionable under Section 10(b) or Rule 10b-5, which caused them any loss. With respect to Grantham, although she did deal with Pinter, the court finds that Dahl, not Pinter, was the person who caused her to purchase. Finally, with respect to Dahl himself, the court finds that he relied on his own investigation and observations, rather than on any representations by Pinter, in making his decision to purchase.

26. Moreover, the court is persuaded that Dahl would have purchased these interests even if any omitted facts of which he now complains had been disclosed to him. Given Dahl's "bell cow" role for the other plaintiffs, the court believes that their decisions would not have been any different either.

27. Plaintiffs have also failed to prove *scienter*, a necessary element to recovery under Section 10(b) and Rule 10b-5. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976). Plaintiffs offered a voluminous amount of evidence that the subject properties were so unlikely to produce oil and gas in commercial quantities that no prudent operator would ever have completed them, but the court was unconvinced that the evidence established any more than negligence on the part of defendants rather than recklessness as contended by plaintiffs.

28. Dahl did not exercise control over the business affairs or decisions of Pinter d/b/a Black Gold. Neither did Pinter d/b/a Black Gold control Dahl as to his business affairs and decisions.

29. The mineral interests involved were owned by Pinter d/b/a Black Gold. These interests were fractionated and offered to various purchasers, not limited to the plaintiffs herein.

Conclusions of Law

1. This action arises under the Securities Act of 1933, 15 U.S.C. §77a *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. §78a *et seq.* Pendent claims are asserted under the Texas Securities Act, Art. 581-1 *et seq.*, TEX. REV. CIV. STAT. (Vernon 1964), Section 27.01 of the Texas Business and Commerce Code (Vernon 1968) and Sections 25401 and 25110 of the California Corporate Securities Act of 1968.

2. The court has jurisdiction of the parties and the subject matter under 15 U.S.C. §§77v, 78aa and the doctrine of pendent jurisdiction.

3. Venue is proper in this district. 15 U.S.C. §§77v and 78aa.

4. The fractional undivided interests in oil, gas and other minerals sold by B. J. Pinter d/b/a Black Gold Oil Company constituted the offer, sale and delivery after sale of securities within the meaning of the Securities Act of 1933, the Securities Exchange Act of 1934, the Texas Securities Act, and the California Corporate Securities Act of 1968.

5. The payment for such securities made by plaintiffs to Pinter and/or Black Gold rendered the transaction a "purchase" of a security and each plaintiff a "purchaser" of a security within the meaning of Rule 10b-5 and Section 10b, Securities Exchange Act of 1934.

6. Dahl was not a "controlling person" of Pinter or Black Gold. Dahl did not have a "control relationship," by ownership, agency or otherwise, with Pinter and/or Black Gold.

7. Pinter's ownership, fractionating, offer and issuance of the oil and gas interests involved in this suit constituted Pinter and Black Gold the "issuer" of these securities.

8. Plaintiffs did not establish grounds for relief against defendants under Section 10(b) or Rule 10b-5 of the Securities Exchange Act or section 27.01 of the Texas Business and Commerce Code.

9. The so-called "private offering" exemption is an affirmative defense which must be raised and proved by the defendants. Swenson V. Engelstad, 626 F.2d 421, 425 (5th Cir. 1980). Defendants have not proved that they are entitled to the "private offering" exemption from registration afforded by the federal securities law (15 U.S.C. §77d(2) and Rule 146) or by the Texas Securities Act (Art. 581-5(I), TEX. REV. CIV. STAT. (Vernon Supp. 1984)).

10. Defendants' statute of limitations defense to the federal claim of selling unregistered securities is without merit, because the limitations period of one year began to run upon the last to occur of defendants' offer, sale, or delivery, 15 U.S.C. §77m, and some of these events did not occur more than one year prior to suit.

11. Defendants' statute of limitations defense to the claim of selling unregistered securities which is founded on the Texas Securities Act is likewise without merit, because suit was brought within three years of sale. Art. 581-33(H)(1)(a), TEX. REV. CIV. STAT. (Vernon's Supp. 1984).

12. Since the interests involved here were unregistered securities, and since the defendants have not established any exemption from the requirement that the securities be registered, plaintiffs are entitled to recover the consideration paid for their securities with interest upon proper tender of their interests to the defendants. 15 U.S.C. §77*l*; Art. 581-33(A), (D), TEX. REV. CIV. STAT. (Vernon's Supp. 1984).

13. In view of the court's conclusion that plaintiffs are entitled to recover on some of their claims under federal and

Texas law, the court need not decide whether California law, or other provisions of federal law (such as Section 12(2)), also afford a remedy to plaintiffs in the present circumstances.

14. The evidence did not establish that defendants are entitled to any relief on their counterclaims. As a matter of law, defendants are not "consumers" within the meaning of the Texas Deceptive Trade Practices -- Consumer Protection Act, Section 17.50, TEX. BUS. & COM. CODE (Vernon Supp. 1984). Swenson v. Engelstad, above, at 428.

15. Plaintiffs are not entitled to recover attorneys' fees.

It is hereby ORDERED that, within fifteen days of this date, counsel for plaintiffs submit a proposed form of judgment consistent with the foregoing findings and conclusions.

September 21, 1984.

A. JOE FISH

A. JOE FISH
United States
District Judge

OPPOSITION

BRIEF

NO. 86-805

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BILLY J. "B. J." PINTER, *et al.*,

Petitioners

v.

MAURICE DAHL, *et al.*,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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March 9, 1987

QUESTIONS PRESENTED

Section 12(1), Securities Act of 1933, provides a private right of action to a purchaser of securities sold in violation of Section 5 of the Act. Section 5 provides that it is unlawful to offer, sell, or deliver after sale, any security by means of the mails or instrumentalities of interstate commerce, unless those securities have been registered under that Act. Section 4(2) and Rule 146 (17 C.F.R. 230.146) provide for an exemption from the registration provisions of that Act in transactions not involving any public offering.

The questions presented by Petitioner, here restated, are:

Where a purchaser seeks relief under §12(1) against the issuer who sold him unregistered securities in violation of §5 may such claim be barred by the defense of *in pari delicto* where the sole wrongdoing was the purchaser had knowledge that the securities were unregistered.

Where a purchaser seeks relief under §12(1) against the issuer who sold him unregistered securities in violation of §5 may such claim be barred by the defense of *in pari delicto* where the issuer asserts the wrongful conduct of that purchaser was that such purchaser became a wrongful "seller" when, at the instigation of the issuer, he gratuitously informed his family and friends about the opportunity to buy such securities from the issuer.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Respondent, Maurice Dahl, respectfully requests this Court to deny issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit which was entered in this cause on July 18, 1986.

OPINIONS BELOW

Respondent adopts Petitioner's[1] recitation concerning the opinions rendered by the trial court and Court of Appeals. The

[1] Pinter, individually and d/b/a Black Gold Oil Company, is the only real party. The other named defendants in the trial court were non-existent entities or merely names proposed to be used by Pinter in his oil and gas operations. Thus the use of the singular "Petitioner" in this response.

opinions of the Court of Appeals, including its opinion on the petition for rehearing and suggestion for rehearing *en banc*, and the Memorandum Decision of the United States District Court are reprinted in the Appendix hereto in the same order and with the same pagination as in that Petition of Petitioner.

JURISDICTION

Respondent adopts Petitioner's statement regarding jurisdiction, subject to Respondent's continued assertion that the defenses of estoppel and *in pari delicto* as here raised were first raised on appeal to the Court of Appeals for the Fifth Circuit and were not raised with reference to §5 violations in the trial court.

STATUTES AND REGULATIONS INVOLVED

1. *Section 12(1), Securities Act of 1933, 15 U.S.C. §77 l(1):*

"Any person who offers or sells a security in violation of Section 5 [15 U.S.C. §77e] ... shall be liable to the person purchasing such security from him, who may sue either in law or in equity ... to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

2. *Section 5(a), Securities Act of 1933, 15 U.S.C. §77e(a):*

"Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly —

(1) to make use of any means or instruments of transportation in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale."

3. *Section 4(2), Securities Act of 1933, 15 U.S.C. §77d(2):*

"The provisions of section 5 shall not apply to —

* * *

(2) transactions by an issuer not involving any public offering."

4. *Section 15, Securities Act of 1933, 15 U.S.C. §77o*

Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under section 11, or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

5. *Section 33A(1), Texas Securities Act, Vernon's Annotated Revised Civil Statutes (VARCS), Sec. 581-33A(1), Liability of Sellers — Registration and Related Violations:*

"A person who offers or sells a security in violation of Section 7 ... 9, 12, 23B ... is liable to the person buying the security from him, who may sue either at law or in equity for rescission or for damages if the buyer no longer owns the security."

6. *Section 33F., Texas Securities Act, VARCS, Sec. 581-33F. Liability of Control Persons and Aiders:*

"(1) A person who directly or indirectly controls a seller, buyer, or issuer of a security is liable under Section 33A . . . jointly and severally with the seller, buyer, or issuer, and to the same extent as if he were the seller, buyer, or issuer, unless the controlling person sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of facts by reason of which the liability is alleged to exist.

"(2) A person who directly or indirectly with intent to deceive or defraud or with reckless disregard for the truth or the law materially aids a seller, buyer, or issuer of a security is liable under Section 33A . . . jointly and severally with the seller, buyer, or issuer, and to the same extent as if he were the seller, buyer, or issuer.

"(3) There is contribution as in cases of contract among the several persons so liable."

7. *Section 12, Texas Securities Act, VARCS, Sec. 581-12:*

" * * * No salesman or agent shall, in behalf of any dealer, sell, offer for sale, or make sale of any securities within the state unless registered as a salesman or agent of a registered dealer under the provisions of this Act."

8. *Rule 146, 17 C.F.R. 230.146,* relating to a 'safe harbour' under the non-public offering exemption provided by §4(2), Securities Act of 1933, is set forth in the appendix at p. a-50 due to its extreme length. This is the exemption upon which Pinter/Black Gold relied in its investment letter-agreement. See p. a-39. Rule 146 was superceded by Regulation D, effective April 15, 1982. Such Rule is located in pre-1983 C.F.R. or in 2 CCH Federal Securities Law Reporter ¶5718B.

STATEMENT OF THE CASE

All Plaintiffs except Grantham are California residents. Grantham, Dahl's fiance, is a Texas resident. Defendants are Texas residents. Plaintiffs brought suit in Dallas, Texas to rescind, or obtain damages incurred in, transactions where they purchased securities (fractional undivided oil and gas interests) in drilling ventures offered by Pinter d/b/a Black Gold Oil Company. The suit was grounded on three basic federal claims (in addition to comparable claims under Texas and California law): (1) §12(1) claim under the Securities Act of 1933 [15 U.S.C. §77l(1)] where unregistered securities are sold in violation of §5 of the Act [15 U.S.C. §77e]; (2) §12(2) of the Securities Act of 1933 where the securities are sold by means of a prospectus or oral communications which include untrue statements of material facts or omit to state material facts necessary to make other statements not misleading [15 U.S.C. §77l(2)]; and (3) the implied cause of action for manipulative and deceptive acts and practices in violation of §10b and Rule 10b-5 thereunder, Securities Exchange Act of 1934 [15 U.S.C. §78j(b); 17CFR §240.10b-5]. Defendant raised eighteen affirmative defenses and also counterclaimed against Dahl for fraudulent misrepresentations and omissions and for interference with Pinter's business relationships with other Plaintiffs.[2]

The trial court held (1) Plaintiffs could not recover under their 10b-5 claim because of failure to establish Defendants' requisite *scienter* and failure to establish reliance upon any statement made by Pinter; (2) Plaintiffs could recover on their §12(1) claim — Pinter/Black Gold having failed to establish his claim of a transactional exemption from registration; and (3) it (the Court) would not rule on the §12(2) claim (nor on

[2] See p. a-43 containing extracts of certain affirmative defenses in Defendant's Answer, and two counterclaims. By trial amendment Pinter raised the additional defenses of statute of limitations, exempt transactions and unenforcibility of California statutes.

certain other state law claims) since Plaintiffs were entitled to recover under their §12(1) claim and a similar claim under Texas law.

Pinter/Black Gold appealed only from that portion of the judgment granting recovery to Dahl. The appeal was based upon three propositions: that Dahl should be barred from recovering damages because of Dahl's wrongful conduct (estoppel), that Dahl was of substantially equal fault *in pari delicto* with Pinter/Black Gold in violating the statutory provisions forbidding the offer and sale of unregistered securities, and as a joint tort feasor Dahl should be liable in contribution to Pinter in making the other plaintiffs whole. Pinter/Black Gold's thesis revolves around the established fact that Pinter had direct pre-investment contact and communications only with Dahl and Grantham — not with any of the remaining California investor-plaintiffs who had direct pre-investment contact only with Dahl. Pinter seeks to bar all claims of Dahl relating to unregistered securities purchased by him, not just those claims relating to the securities in which the California plaintiffs invested along with Dahl.

Dahl was primarily engaged in real estate construction contracting and development, had direct investments in other types of business and was actively looking for business opportunities in the oil and gas industry. Dahl met Pinter. Pinter was an oil and gas operator who had substantial experience in selling his oil and gas investment programs. Pinter had been a licensed oil and gas securities broker-dealer in Texas for twenty years. Their first business transaction involved Dahl loaning money to Black Gold with the understanding that, in addition to repayment of the loans, Dahl would have the right of first refusal to participate in developing any oil and gas leases purchased by Pinter with such loan proceeds. In November and December 1980 Dahl loaned Pinter $15,000 and $38,000. Pinter purchased the Emanuel Clark lease, the Walter Clark lease and the F. B. Watkins lease. This led to their second

business transaction. Dahl met with Pinter to consider investing with Black Gold in drilling and reworking three wells as proposed by Pinter. They went to Oklahoma and walked upon the leases to be drilled and developed. In March 1981 Dahl decided to invest with Pinter, with Dahl borrowing upon his share of a Nebraska cattle partnership. Dahl signed three investment letter-agreements (one for each well) provided by Pinter/Black Gold. Dahl purchased a ⅛ working interest in the Emanuel Clark 1-B well ($57,500), the Walter Clark 1-C well ($101,000) and the Watkins 1-A well ($93,000). In March 1981, Dahl also purchased a 1/16th overriding royalty interest in the two Clark leases by cancelling $15,000 of the loan indebtedness of Pinter/Black Gold to him.

The next transaction involved two leases upon which Pinter had previously drilled three wells with other unknown investors — the Antwine lease and the Doss lease. Pinter told Dahl that he had a few interests left in Black Gold's proposed Antwine 2-C well and in the proposed Doss 3-B well because not all of his previous investors in those two leases were able to continue participating. Dahl said he and some of his friends might be interested. Pinter provided Dahl with forms of investment letter-"agreements" to be signed by any friend or associate of Dahl who wanted to participate. Upon his return to California Dahl enthusiastically told some of his family, friends and associates about Pinter and his (Dahl's) investments with Pinter. As a result of Dahl telling his friends and associates about this investment opportunity ten California residents, all Plaintiffs below, decided to participate in the working interest ownership in either the proposed Doss 3-B or Antwine 2-C well. Their checks were payable to Black Gold with each investment being either $7,480 or $7,150 per unit of 2/64ths working interest.

Dahl's purchases in the Antwine and Doss wells were paid by $14,465 check in March, and by cancellation of $29,260 of Pinter's remaining $38,000 debt to him in April. Pinter paid

the balance of his debt to Dahl by check. The 11 investors who invested with Pinter because of Dahl's investment were Dahl's brother, Dahl's accountant, Dahl's partner in the construction business, Dahl's bank officer handling construction loans, Dahl's financier in the construction business, Dahl's construction business insurance agent, and several businessmen Dahl had known since they were in grammar school together. Dahl testified each of these persons invested primarily because of Dahl's substantial personal investments with Pinter and because Dahl thought it was a "good deal". None of the California investors met or talked with Pinter prior to investing. The only contact these investors had with Black Gold was receiving the investment letter-agreement form from Black Gold through Dahl and which agreement they signed at the time they made their investment. These agreements and checks were delivered together to Black Gold. In the eyes of the trial court, Dahl's enthusiastic discussions about the Black Gold proposals and the investment opportunities available constituted a form of solicitation by Dahl.

In the Antwine 2-C well Dahl purchased a 5/64th working interest for $18,700, Grantham purchased a 1/64th for $3,740 and nine other Plaintiffs purchased a total of 18/64ths for $67,320 — with all Plaintiffs representing an aggregate of 24/64ths at an investment cost of $89,760. In the Doss 3-B Dahl purchased 7/64ths for $25,025, Grantham purchased 1/64th for $3,575 and one other plaintiff purchased 2/64ths for $7,150 — with all Plaintiffs representing an aggregate of 10/64ths for $35,750.[3] The investment amount sued for by Plaintiffs was: Dahl — $310,525, Grantham — $7,315 and the ten remaining Plaintiffs — $74,770.

[3] A Dahl friend, a resident of London, England purchased one unit (2/64ths) in the Doss 3-B for $7,150. He was neither a party nor a witness in this cause. Those investors who purchased all or a part of the remaining 40/64ths in the Antwine 2-C and the remaining 52/64ths of the Doss 3-B were unknown to Dahl or to any Plaintiff. Some of them were located during pre-trial investigation and testified on behalf of the Plaintiff.

Before, during and after Plaintiffs' participation Pinter had other drilling ventures in the same geographic area with other investors involved, and Pinter had other investors in the Doss and Antwine wells in which Plaintiffs participated. In all drilling ventures conducted by Black Gold each investor was presented with and signed the same form of investment "Agreement", which had a few blanks to be filled in as to name, address and amounts being invested. As noted by the Court of Appeals, each such agreement contained the language:

> "WHEREAS the parties constitute a predetermined and limited group of sophisticated and knowledgeable well informed investors who desire to arrange for participation in an oil and/or gas drilling venture as an investment and do declare that it is not for the purpose of reselling their interest therein. *(These participating interests are being sold without the benefit of registration under the Securities Act of 1933, as amended, and on [sic] reliance of rule 146 thereunder).*" [Emphasis supplied] See p. a-5 and a-39 for full text of investment agreement.

Pinter's affirmative defenses alleged that Dahl made fraudulent misrepresentations to Pinter and to Dahl's co-plaintiffs, as set forth in Pinter's counterclaims, and that Dahl should be barred from recovery on all of his claims by reason of his fraudulent conduct. See Second and Fifth Defense, Paragraphs 2 and 5 and Counterclaims One and Two, [Defendant's Answer] partially reproduced at p. a-43, infra. The specific alleged wrongful conduct of Dahl to estop Dahl and which was *in pari delicto* was that Dahl misrepresented material facts to induce Pinter to make sales of securities to Dahl and to induce Pinter to allow Dahl to raise investment capital by securities sales to prospective investors in exchange for Black Gold paying him a sales commission of $38,000;[4] that such in-

[4] Dahl refuted this "commission for sales effort" allegation by producing bank wires, checks and business records to show his payments, that he had loaned money to Pinter and some of his interests were purchased by

ducements were Dahl's false statements that (a) Dahl was an experienced oil man who had a number of friends and business associates who were knowledgeable and sophisticated oil and gas investors who also had sufficient expertise to independently evaluate any drilling and leasehold prospects; and (b) that Dahl represented he would independently provide prospective investors with the facts upon which they could make an independent analysis.[5]

FAILURE TO RAISE ISSUES IN TRIAL COURT

The affirmative defenses raised in the trial court did not assert that Dahl's recovery should be barred because of his knowing purchase of unregistered securities nor because of Dahl's participation in a sale of unregistered securities to other purchasers. That defense did not assert Dahl violated §5, Securities Act of 1933. As raised in the trial court those defenses affirmatively asserted a bar to recovery because Dahl had wrongfully misrepresented material facts to Pinter which induced Pinter to sell securities to Dahl and which induced

cancellation of the loan-indebtedness Pinter owed to him. Pinter than admitted he "was in error" as to the commissions. Despite this proof and admission that no consideration was paid to or received by Dahl for bringing his frineds and associates in as investors, Pinter's brief in the Court of Appeals and in this Supreme Court continue to mislead by omission — inferring that consideration flowed from Pinter/Black Gold to Dahl in exchange for sums invested by Dahl's friends. See "Petition For Writ of Certiorari", last sentence p. 3 and footnote p. 5. The trial court's findings were specific — no commission was received by Dahl "by way of discount or otherwise, in connection with the purchase by any plaintiff [of the involved securities] . . . ." See ¶21, p. a-34. "Dahl did receive a partial credit against the purchase price" for his interests in the Doss 3-B and the Antwine 2-C wells. *"This credit resulted from sums owed to Dahl" by Pinter/Black Gold. See ¶22, p. a-34.* (Emphasis supplied).

[5] Pinter thus did not accept responsibility for his obligation to make necessary disclosures to the Plaintiff purchasers concerning the Antwine and Doss wells and, thereby, ensured the court's finding that he did not meet the requirements of the Rule 146 exemption from registration.

Pinter to allow Dahl to sell securities to the other Plaintiffs in exchange for a $38,000 commission to Dahl. Pinter alleged he did not know the truth as to the facts so misrepresented and he, Pinter, relied upon the misrepresentations to his detriment. See Second and Fifth Defenses as related to Counterclaim One, pp. a-43-44. As such defenses related to Counterclaim Two, Pinter affirmatively asserts, "Dahl wrongfully concealed and failed to disclose . . . his plan to turn 'turkey' and file a lawsuit . . . [should] the oil properties pay out in accordance with his unreasonable expectations" and that Dahl made fraudulent "misrepresentations [to the other Plaintiffs] concerning the liklihood of recovery of oil and gas." Pinter asserted those misrepresentations and omissions were Dahl's wrongful acts in bar to Dahl's recovery under the doctrines of estoppel and *in pari delicto.*

It would appear that the trial court's conclusions that the "evidence did not establish that Defendants are entitled to any relief on their counterclaims" (see ¶14, p. a-38.) coupled with the finding that "Dahl did not have a 'control relationship', by ownership, agency, or otherwise," with Pinter and/or Black Gold (¶6, p. a-36) and that "Pinter, individually and doing business as Black Gold Oil Company, offered, sold and delivered securities in the Antwine 2-C and Doss 3-B to the California investors" (¶12, p. a-32) should have been sufficient to support the trial court's lack of finding that the equal fault defense was applicable.

As such defenses are raised they contend Dahl's fraud bars his 10b-5 action against Pinter. Even removing Pinter's allegations of reliance and scienter, the most such defenses could relate to were §12(2) violations through communications — for which Dahl could raise his "due care" defenses as permitted by §12(2), but not permitted by §12(1). Apparently the Court of Appeals did not consider the distinction between those defenses as raised in the trial court and as raised first on appeal. Respondent asserts the distinction is sufficient so that the trial

court was not aware of an issue to be determined by application of estoppel and *in pari delicto* to the purchase of some unregistered securities by Dahl and to the alleged sale by Dahl of other unregistered securities to his co-plaintiffs. The Court of Appeals for the Fifth Circuit has previously refused to consider the *in pari delicto* defense where on appeal it was first asserted that Plaintiff engaged in a section 5(a) violation along with Defendant. *John R. Lewis, Inc. v. Newman* 446 F.2d 800 (5th Cir. 1971).

SUMMARY OF ARGUMENT

Recovery for Dahl's investments in the Clark-Clark-Watkins leases and wells may not be barred because mere knowledge that those securities were not registered in contrary to the intent of Congress. At a minimum the knowledge required would be that a violation was in fact occurring with Dahl voluntarily joining in such violation. Pinter's written declarations constituted a holding out that all the benefits of registration were provided through the substituted benefits of the Rule 146 exemption.

Dahl lacked culpability in his conduct; Pinter's conduct was culpable. *In pari delicto* was therefore inapplicable, with the *Henderson* standard being most appropriate. Even if we apply the *Eichler* standard there is no equal fault nor would preclusion from suit not interfere with effective enforcement.

Dahl is not a "seller" as to the Antwine and Doss interests sold his co-Plaintiffs. His participation was not the causation of the violations by Pinter and did not contribute to Pinter's violations. Even if Dahl were a "co-seller" with Pinter to the other Plaintiffs, Dahl did not have substantially equal duties to either the public nor to his family and friends. There were no equal duties, equal causation, nor equal fault. Further, preclusion of relief must be based upon Pinter making a showing that it will not significantly interfere with effective enforcement.

This case primarily involves disagreement in the Fifth Circuit as to the application of established legal principles to the facts. Only as to the definition of "seller" is there a partial departure — principally because there has not been sufficient deliniation of principles to apply to this type case where a purchaser by his enthusiasm encourages friends and family to invest. Even such departure from partially established concepts is immaterial because application of the governing standards enunciated in *Eichler* to these facts yet results in a denial of the preclusion of recovery under *in pari delicto* because the two-prong test has not been met by Pinter.

ARGUMENT

> The *in pari delicto* defense is inapplicable to a §12(1) claim where the only wrongful act asserted is the buyer's knowledge that the securities are unregistered because such a result is contrary to Congressional purpose and to public policy.

As to Dahl's purchase of unregistered working interests in the Emanuel Clark, the Walter Clark and the Watkins 1-C wells, and as to his purchase of unregistered royalty interests in the two Clark leases, the only alleged wrongful conduct is Dahl's knowledge he was purchasing unregistered securities because the language of the investment letter-agreement provided "* * * (These participating interests are being sold without the benefit of registration under the Securities Act of 1933, as amended, [i]n reliance of rule 146 thereunder)". Adopting Petitioner's position as to Dahl would also mean none of the Plaintiffs should have recovered under §12(1). Not only did *Henderson v. Hayden,* 461 F.2d 1069 (5th Cir. 1973) specifically refute such an application as not beneficial to the purposes of securities laws, but Congress expressed itself clearly as to this concept by prohibiting any waiver of its statutory requirements when it adopted §14, Securities Act of 1933, 15 U.S.C §77(n):

> "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void."

If the legislature provides that a buyer cannot waive the protection of the securities laws, should the Courts do so under *in pari delicto* where the only wrongful act of the buyer is buying the security with knowledge it is unregistered? Further, where such knowledge is qualified by the issuer's (Pinter's) qualifying statement, "[i]n reliance of rule 146 thereunder", such is tantamount to an affirmative declaration by Pinter/Black Gold that 'even though these securities are not registered we are not required to do so because we have complied with the law as to all the conditions necessary to exempt this transaction from registration.' Congress, and the Commission, have imposed the duty upon Pinter, the issuer, to comply either with registration or with the requirements of an available exemption. Pinter did not establish his compliance with Rule 146 and such compliance is required. There is nothing in the record in this case to show that Dahl knew Pinter had not complied with Rule 146, nor should have known by the exercise of reasonable diligence.

The *Eichler* general standard, requiring a showing that preclusion of suit or recovery does not significantly interfere with effective enforcement of securities laws, is not applicable to this case.

In a private suit for damages brought under a cause of action for violation of the securities laws the general rule is that a wrongdoer cannot avoid liability through *in pari delicto*. *Eichler* stated the only exception is where (1) a violation occurs for which the claimant must bear substantially equal responsibility with the wrongdoer as a result of the claimant's own actions, *and* (2) preclusion of recovery by the claimant does not significantly interfere with the effective enforcement of securities laws nor the protection of the investing public. Dahl's acts of purchasing securities from Pinter are not acts violative of the

§5(a) prohibition against the offer, sale and delivery after sale of unregistered securities.

Pinter has the duty to register securities for sale or to comply with the conditions for availability of an exemption, as such conditions have been announced by regulation or judicial decision. Pinter, the issuer, is the only person with the duty, or with the right, to qualify for the exemption of Rule 146. Pinter did not deliver written material which complied with Rule 146 to Dahl, to the California plaintiffs, nor to the other investors he had in the involved leases and wells. During testimony Pinter did not know what a Form 146 was, what it contained or where it should be filed. Pinter was in violation of §5 before he dealt with Dahl or the California plaintiffs and continued to be in violation because he did none of the affirmative acts required to permit an issuer to not register in "reliance on rule 146". It was not the direct acts of Dahl that resulted in the violations, as required by *Eichler*.

The Fifth Circuit did not improperly use the *Henderson* governing standard in an *in pari delicto* case. Pinter's appeal was based on the trial court allegedly not applying "estoppel" and *"in pari delicto"* standards to bar recovery in a §12(1) case. Judge Hill sought to determine if the governing standard in *Eichler* had supplanted that utilized in *Henderson*. Having identified the key factor leading to the governing standard in *Eichler* as "plaintiff's own culpability" and having found Dahl not culpable, Judge Hill did not apply the *Eichler* standard of determining if barring recovery would not interfere with effective enforcement of securities laws. He applied the *Henderson* standard as a continuing standard where the claimant lacks culpability — thus the Fifth Circuit's conclusion that it was necessary under *Henderson* to determine if barring recovery would have the positive effect of furthering the goals of securities laws. First the Fifth Circuit determined that *Eichler* did not change the standard to be applied to *any* affirmative defense raising an issue as to claimant's conduct. *Henderson*

and *Eichler* both have the same objectives — not to interfere with one's private remedy for relief unless the claimant's injury results from his own conduct which is culpable as to a breach of his legal duty or is morally reprehensible, and then only if preclusion of suit will have a positive regulatory effect either by furthering the goals of securities laws *(Henderson)* or by not interfering with the effective enforcement of those laws *Eichler.*

Having found that *Henderson* was applicable in a §12(1) case because culpability is not the issue, being a strict liability statute, the Fifth Circuit then stated, "We believe that the *Eichler* court's analysis applies with equal force to the case at bar" and that the same result would be reached because Pinter made the first step in the dissemination of unregistered securities and he will be more responsive to the deterrent pressure of potential sanctions while barring Dahl would "inexorably result" in a number of unregistered issues of securities going undetected and unremedied by the authorities. Further, permitting recovery under §12(1) is unlikely to induce Dahl or other similarly situated to enter into illegal transactions involving the issue and sale of unregistered securities. To hold otherwise would be more likely to permit those of Pinter's ilk to continue to affirmatively recite their reliance upon an exemption, without attempting to meet the conditions of that exemption, all as a means of avoiding the registration requirements imposed by the legislature. Not registering securities and then selling them in violation of §5 is the prohibited conduct. Asserting to the world that the benefits of registration are not provided in reliance upon an exemption where no attempt whatsoever was made to comply with the conditions of the exemption is unquestionably culpable conduct which should be deterred. The required "benefits" of that registration are also the required "benefits" of that exemption; i.e. to provide a prospective investor with all material information necessary for the investor to make an informed investment decision. Rarely, if ever, is a duty imposed upon a buyer to determine if all

conditions of an exemption from registration have been met; a duty is so implied only where the buyer consciously and knowingly participates in effecting a wrongful act such as where the purchaser knowingly joins in a scheme to make an illegal distribution of securities in violation of a securities statute. See *Ladd v. Knowles,* 505 S.W.2d 662 (Tex. C.A.-Amarillo, 1974). Dahl's conduct was not willful misconduct nor morally reprehensible as to known facts. See a-9, ¶4. The Fifth Circuit applied the *Henderson* standard because it found no culpability which forms the basis for the *Eichler* standard, and particularly noted a lack of equal culpability. Even applying *Eichler* standards to the facts of this case the Court found "Causation ... does not create unclean hands nor does equal causation constitute equal fault." See a-9, ¶5. Thus even should Dahl be deemed a "seller", he would not be an "equal fault" seller.

Even if Dahl is deemed a "seller" within the meaning of §12(1), he would only be deemed a "co-seller" of interests in the Antwine 2-C and the Doss 3-B to the California Plaintiffs. Pinter may not sidestep his liability as the sole "seller" of interests in the Antwine 2-C and Doss 3-B to Dahl upon a theory that Dahl's assistance to Pinter as a "co-seller" to the California investors was the causation factor for Dahl's own injury.

Under §12(1) recovery may be had "regardless of whether it can be shown that the seller had any degree of fault, negligent or intentional. *Hill York Corp. v. American International Franchises, Inc.,* 448 F.2d 680,686 (5th Cir. 1971). A "seller" is one (1) who parts with title to securities in exchange for consideration or (2) whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place. *Swensen v. Engelstad* 626F.2d at 426-27 (5th Cir. 1980). *Pharo v. Smith,* 621F.2d 656, 667 (5th Cir. 1980). This definition has been broadened slowly and cautiously, however, because of the strict liability prescribed. As stated in *Pharo v. Smith* at 959, fn. 6.

> "* * * Section 12(2) unlike Section 12(1) would relieve a seller who sustains the burden of proof that he did not know and in the exercise of reasonable care could not have known of the violation of the statute's antifraud provision. Section 12(1) however would impose liability on a person regardless of his knowledge that unregistered securities may have been sold. *The precise question the Hill York panel declined to consider is whether the definition of a Section 12(1) seller should be tempered by the policy against broadening the scope of a strict liability statute to include persons not clearly within its intended reach."* (Emphasis supplied).

In *Hill York* the defendants fell within the proximate cause concept of "seller" because their actions were the motivating force behind the securities sales in question. *Hill York* at 692-93. As *Hill York* determined the facts to which it applied the law, it stated at 693, quoting *Lennerth v. Mendenhall*, 239F.Supp 59, 65 (N.D. Ohio 1964):

> "The hunter who seduces the prey and leads it to the trap he has set is no less guilty that the hunter whose hand springs the snare."[6]

There was obviously an element of intent and morally reprehensible conduct in *Hill York* as applied and determined by the Fifth Circuit.

> "Mere participation in the events leading up to the transaction is not enough. But beyond the words 'substantial factor', we have no guideposts other than the factual situations presented in . . . [*Hill York* and *Lewis v. Walston & Co.*] to assist us in determining whether to impose strict liability in a given case." See *Pharo v. Smith* at 960.

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[6] Beginning with its first compiaint, Dahl and all Plaintiffs asserted Dahl was utilized by Pinter as a "bell cow"; i.e. as one that takes the lead or initiative for a group. Pinter sought to establish Dahl as a "Judas goat" — one who leads sheep to slaughter. The facts did not establish such type conduct by Dahl.

> "Participation in the sale . . . is an important factor only as it relates to the concept of causation. A determination [of participation] . . . should not be conclusive as to the participant's liability as a seller but it may be a criterion in determining [if] . . . defendant caused the transaction to take place." *Croy v. Campbell*, 624F.2d 709, (5th Cir. 1980).

It appears that the Fifth Circuit and other courts have historically borrowed from Tort law in attempting to apply §12(1) and (2) to various fact situations. In most instances where acts of participation are alleged to be a 'substantial factor' it has involved conduct where one accomplished a wrongful result with his own conduct constituting a breach of duty to the injured party, or at least the participant knew another person's conduct involved a breach of duty and, despite that knowledge, the participant gave substantial assistance or encouragement to such conduct of the person who breaches his duty. See *Pharo v. Smith, Hill York, Lewis v. Walston & Co., Junker v. Crory.* See also "Restatement (Second) of Torts §876 ("Acting in concert"), §§431,432,433 ("negligent conduct" and "considerations in determining if negligent conduct is a substantial factor in producing harm"). The trial court found Dahl was not a controlling person and did not find Dahl to be an aider or a principal.

As Chief Judge Lively states in his dissent in *Davis v. Avco Financial Services, Inc.*, 739 F.2d 1057 (6th Cir. 1984), *cert. denied*, 105 S.Ct. 1359 (1985):

> "* * * The federal securities laws . . . do display a studied approach to a variety of problems. Different participants in various stages and types of securities transactions are treated individually. * * * "
>
> * * *
>
> "Ascertainment of congressional intent with respect to the standard of liability created by a particular section of the securities acts must 'rest primarily on the

language of that section,' " citing *Ernst and Ernst v. Hochfelder*, 425 U.S. 185,200,96 S.Ct. 1375, 1384, 47 L.ED.2d 668 (1976).

It appears incongruous that §12(2) "sellers", and persons who may be "controlling persons", "aiders and abettors", "co-conspirators" and "participants in a scheme to defraud" are entitled to avoid liability by showing due care or perhaps lack of knowledge, yet an indirect participant who acts gratuitously, without any duty to such persons, is to be considered strictly liable in order to permit a seller with knowing violations of the registration and exemption requirements to escape his personal liability to disgorge that which he has wrongfully taken. Certainly not by Congressional directive. Certainly not by judicial standards. Any such result would be morally reprehensible.

Assuming Dahl is a §12(1) "seller" as to his co-Plaintiffs who acquired interests in the Antwine 2-C and Doss 3-B, the *in pari delicto* defense is not applicable because such does not relate to the causation of Dahl's own injury in purchasing the securities in those same wells for his own account, i.e. such purchases were not a direct result of his own actions which led to the violations. Cf. *Bateman Eichler*. Under §12(1) Pinter's liability to Dahl is absolute.

Even if Dahl is deemed a "co-seller" to the California Plaintiffs, Dahl's acts were not of "equal fault" to that of Pinter, and Dahl's relief should not be barred.

In pari delicto requires equal fault. Equal fault does not relate merely to the act of selling — it also relates to the violation of the registration provisions and, in this case, to the failure to comply with the conditions precedent to the available non-public offering exemptions of §4(2) and Rule 146. Pinter was an experienced oil and gas securities broker and dealer, having been so licensed in Texas for twenty years. He knew securities must be registered or an exemption established. He knew Dahl could not be his sales agent unless Dahl himself was

licensed as a salesman for Pinter or some other licensed broker-dealer. Under Rule 146, if Dahl was a salesman for Pinter, then Pinter had a duty to disclose such information to the California purchasers. If Dahl was the representative of the California purchasers, Pinter had a duty to disclose any relationship he had with Dahl, any understandings as to commissions or any form of compensation, and was required to obtain a written acknowledgement from each purchaser that Dahl was his representative. Where Pinter offered or sold the same or similar class of securities within six months preceding this offering, Rule 146 was not available. See ¶(b)(1), Rule 146, p. 5057-18, 19, infra. Under Rule 146 Pinter could not engage in general solicitations. See ¶(c) "Limitation on Manner of Offering", Rule 146, p. 5057-19, infra. Pinter was required to believe and yet believe, after making reasonable inquiry, that each offeree was capable of evaluating the merits and risks of the prospective investment or was able to bear its economic risk. See ¶(d) "Nature of Offerees", Rule 146, p. 5057-19, infra. Most importantly, Rule 146, ¶(e), "Access to or Furnishing of Information", p. 5057-20, infra, requires that each offeree have access to or *"be furnished during the course of the transaction and prior to sale*, by the issuer or any person acting on [the issuer's] . . . behalf, the same kind of information that is specified in Schedule A of the Act . . . ." — being the information that would be required to be included in a registration statement. Pinter also had a duty to determine the "number of purchasers" (¶(g), Rule 146, p. 5057-22) and to file Form 146, a Report of Offering", with the Regional Office of the SEC at the time of his first sale. See ¶(i), Rule 146, p. 5057-23.

The preliminary notes to Rule 146 make it clear that these and other duties are those of the issuer and not those of the purchaser nor of a person who knows of prospective purchasers. Thus:

"3. • • • The courts and the Commission have interpreted the Section 4(2) exemption to be available for

> offerings to persons who have access to the same kind of information that registration would provide and who are able to fend for themselves. * * * Rule 146 is designed to provide, to the extent feasible, objective standards upon which responsible businessmen may rely in raising capital . . . .
>
> " . . . the issuer claiming the availability of the rule has the burden of establishing, in an appropriate forum, that it has satisfied . . . [all the conditions of the rule] with respect to each offeree as well as to each purchaser."
>
> " * * * all offers . . . or sales . . . must meet all of the conditions of Rule 146 for the rule to be available. * * * "
>
> "6. The rule is available only to the issuer . . . and is not available to affiliates or other persons for sales of the issuer's securities."

Thus the duty to register the securities or to establish all the conditions of the exemption provided by Rule 146 were on Pinter, the issuer, not on Dahl, the purchaser and "bell cow". If Pinter and Dahl did not have equal duties to register the securities or to fulfill the requirements of the exemption by providing the "benefits" of that exemption or registration, how can they be of substantially equal fault in not complying with §5 requiring registration or with §4(2) and Rule 146 which require the equivalent alternative to registration? The violation of §5 for which §12(1) provides a remedy is not just the sale of a security; it is the sale of an unregistered security with the duty to register or meet the exemption being the underlying unfulfilled act required by the Securities Act of 1933. Congressional intent was not to protect the investing public from the sale of securities, but to protect them from the foisting off of securities without full disclosure of all material information necessary for an investor to make an informed investment decision.

Pinter's not providing "the benefits of registration [i]n reliance on rule 146" equates to a representation to the world

and to each prospective investor that receives his investment letter-agreement that the benefits of the exemption of Rule 146 are being made available to that prospect. Dahl and each prospective purchaser was entitled to rely upon and to believe that statement — otherwise each is knowingly and unlawfully purchasing an unregistered security and, under Pinter's theory, is of equal fault.

Pinter did not establish evidence concerning the availability of the exemption as to each investor in the Antwine 2-C and Doss 3-B who had purchased their interests from Pinter prior to his sales to the Plantiffs in this case as is required by the rule and as enunciated in *Doran v. Petroleum Management Co.*, 545 F.2d 893 (5th Cir. 1977). Pinter failed and, in fact, made little effort to establish the availability of and compliance with the exemption of §4(2) and/or Rule 146. Pinter attempts to put Dahl in a "no win" position. If Dahl helps establish the exemption, Pinter wins. If Dahl opposes proof of the exemption being met, Dahl loses. A true "heads I win, tails you lose" concept completely contrary to Congress' purpose in enacting §12(1) and opposite to the public interest standard used in determining the propriety of permitting *in pari delicto* as a bar.

Analogous to the case at hand is *Malampy v. Real-Tex Enterprises, Inc.*, 527 F.2d 978 (4th Cir. 1975), an unregistered securities case, which held that the *in pari delicto* defense was available and equal guilt would bar recovery where the purchaser was a culpable participant knowingly soliciting fraudulent contracts, but that such defense does not bar recovery by a defrauded purchaser who naively urges others to invest. See also *Lawler v. Gilliam*, 569 F.2d 1283, (4th Cir. 1978). As Judge Hill for the Fifth Circuit stated for the majority in this case:

> " * * * The doctrines [of unclean hands and *in pari delicto*] apply "only where some unconscionable act of one coming for relief has immediate and necessary

> relation to the equity he seeks in respect to the matter in litigation." . . . [those] maxims operate against conduct which is contrary to the dictates of good conscience or fair dealing. * * * [they] refer to "willful misconduct rather than to merely negligent conduct. The improper conduct . . . must involve intention as opposed to an inadvertent act or a misapprehension as to known facts." See p. a-9.

And at p. a-9 he continues, "Causation . . . does not create unclean hands nor does equal causation constitute equal fault."

CONCLUSION

Even assuming Dahl was a "seller" of the unregistered securities in the Antwine 2-C and the Doss 3-B such is not a bar to his recovery for his purchases of interests in the Clark and Watkins leases and wells. As to each and every transaction of purchase by Dahl, and as to the alleged "sale" of Pinter's securities by Dahl, Pinter is unable to hurdle either test of *Eichler* — First, that Dahl bears substantially equal responsibility as a result of his own conduct or Second, that denial will not significantly interfere with the enforcement of the securities laws.

Premises considered, Respondent respectfully prays that this Honorable Court deny the Writ of Certiorari to review the judgement in this case of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,
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Certificate of Service

I hereby certify that on this 10th day of March, 1987, four true and correct copies of the foregoing Brief of Respondent in Opposition were delivered by personal delivery to the office of Petitioner's counsel of record at his address as follows: Braden W. Sparks, 2940 Lincoln Plaza, Dallas, Texas 75201.

/s/ MICHAEL F. LINZ
Michael F. Linz

/s/ JOHN A. SPINUZZI
John A. Spinuzzi

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MAURICE DAHL, GARY CLARK, W. GRANTHAM, ROBERT DANIELE, CHARLES DAHL, DOWAYNE BOCKMAN, RAY DILBECK, RICHARD KOON, ART OVERGARRD, JACK YEAGER, ACCRA TRONICS SEALS CORP., AND AARON HELLER,

Plaintiffs-Appellees,

v.

BILLY J. "B. J." PINTER, BLACK GOLD OIL COMPANY, PINTER ENERGY COMPANY, AND PINTER OIL COMPANY,

Defendants-Appellants.

No. 84-1970
OPINION

Filed April 18, 1986

Before: John R. Brown, Thomas M. Reavley, and Robert M. Hill, Circuit Judges.

Opinion by Judge Robert M. Hill;
Dissent by Judge John R. Brown

Appeal from the United States District Court
for the Northern District of Texas
A. Joe Fish, District Judge, Presiding

SUMMARY

Securities

Appeal from judgment of liability under section 12 of the Securities Act of 1933, 15 U.S.C. §77(*l*)(1) and article 33A(1)

of the Texas Securities Act, Tex. Rev. Civ. Stat. Ann. art. 581-33A(1) (Vernon Supp. 1986). Affirmed.

Pinter sold unregistered securities (fractional undivided interests in oil and gas leases) to Dahl and Dahl's associates. Dahl had solicited his associates to purchase the securities and knew the interests were being sold without benefit of registration. The interests proved worthless and Dahl and his associates sought recovery from Pinter under the securities laws. Pinter was held liable based on his status as a seller of unregistered securities. Pinter argues that Dahl was also a seller and should therefore be accountable in contribution and should be barred from any personal recovery.

[1] *Henderson v. Hayden*, 461 F.2d 1069 (5th Cir. 1972) held that a plaintiff seeking a return of consideration paid for unregistered securities under section 12(1) could not be estopped by virtue of his having been aware that the securities were unregistered. [2] *Henderson*, however, may have been displaced by *B. Eichler, H. Richards, Inc. v. Berner*, 472 U.S. __, 105 S.Ct. 2622, 86 L.Ed.2d 215 (1985), [3] which established that under certain circumstances, *in pari delicto* will bar a plaintiff's recovery in a section 10(b) action under the Securities Exchange Act of 1934, 15 U.S.C. §78j(b). [4] The *in pari delicto* doctrine refers to willful misconduct rather than to merely negligent conduct. [5] Unlike section 10(b), section 12(1) is a strict liability offense. Absent some showing that Dahl's conduct was offensive to the dictates of natural justice, the *in pari delicto* and unclean hands defenses are not available.

[6] It must also be decided whether Pinter may defend on the grounds of estoppel and whether *Eichler* or *Henderson* represents the controlling standard. *Henderson* applies because *Eichler* applies when damages are sought to be barred on the grounds of the plaintiff's own culpability, a condition

not present here. [7] The estoppel theory has no independent existence in the principles of judicial integrity but arises exclusively from within the relationships that are regulated by federal statute. The issue, therefore, is whether section 12(1) can be fairly construed as applying only to purchasers who do not know their securities are unregistered. *Henderson*, which posed the question whether allowing plaintiff's suit in accordance with the express provisions of section 12(1) would frustrate the purposes of the Securities Act of 1933, is a sound construction and the failure to allow the asserted equitable defenses was not erroneous.

[8] Under section 12(1), a "seller" is one who parts with title to securities in exchange for consideration or whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place. [9] Clearly, Dahl's conduct was a "substantial factor" in causing the other plaintiffs to purchase securities from Pinter. [10] However, he is not a "seller" for the purposes of section 12(1) as the substantial factor test was formulated and applied under facts which differ substantially from the facts of this case. Here Dahl did not receive or hope to receive some financial benefit for his efforts. A rule imposing liability without fault or knowledge on friends and family members who give one another gratuitous advice on investment matters unreasonably interferes with well-established patterns of social discourse. Therefore, Dahl is not a seller and not liable for contribution.

The dissent argues that Dahl's conduct gives rise to two theories under which the *in pari delicto* defense operates to bar his recovery under either Texas law or the 1933 Act.

OPINION

ROBERT M. HILL, Circuit Judge:

In this appeal Pinter[1] urges that his liability under section 12(1) of the Securities Act of 1933, 15 U.S.C. §77(*l*)(1), and article 33A(1) of the Texas Securities Act, Tex. Rev. Civ. Stat. Ann. art. 581-33A(1) (Vernon Supp. 1986), should be diminished by plaintiff Maurice Dahl's wrongful conduct. We disagree with this contention and affirm the decision of the district court granting judgment for plaintiffs.

I.

This controversy arises out of the sale of unregistered securities (fractional undivided interests in oil and gas leases) by Pinter to Dahl and to Dahl's associates. Dahl is a California real estate investor who, at the time of his dealings with Pinter, was a veteran of two failed oil and gas ventures. Ever an optimist, Dahl aggressively sought out additional oil and gas properties for investment and after an extensive search settled on some leases held by Pinter. Dahl toured the property several times, frequently without Pinter, so that he could talk to others and "get a feel for the properties." After looking at the geology, drilling logs, and production history assembled by Pinter, he concluded that there was no way he could lose.

Dahl was so enthusiastic about Pinter's leases that he told plaintiff Wendy Grantham and the ten other plaintiffs, all of

[1] The defendants-appellants are Billy J. Pinter, individually and d/b/a/ Black Gold Oil Co., Pinter Energy Co., and Pinter Oil Co. Throughout this opinion appellants will be referred to as "Pinter."

whom were either friends or family of Dahl, about the venture. The district court found that with the exception of Grantham who herself conceived the idea to purchase, Dahl "solicited" these friends "in connection with the offer, purchase, and receipt of their oil and gas interests." These solicitations clearly were motivated by Dahl's desire to enrich his friends and family as Dahl received no commission by way of discount or otherwise in connection with the purchases made by any plaintiff.

Each investment letter-contract signed by the purchasers was a form prepared by Pinter. That document contained the following language:

> Whereas the parties constitute a predetermined and limited group of sophisticated and knowledgeable well informed investors who desire to arrange for participation in an oil and/or gas drilling venture as an investment and do declare that it is not for the purpose of reselling their interest therein. (These participating interests are being sold without the benefit of registration under the Securities Act of 1933, as amended, and on reliance of rule 146 thereunder).

Dahl, who helped each of the other plaintiffs complete the letter contracts, knew that the interests were being sold without benefit of registration. There is no evidence, however, that Dahl knew that Pinter's failure to register was in violation of federal and state securities laws.

The plaintiffs' acquired interests ultimately proved worthless and plaintiffs sought relief under section 12(1) of the

Securities Act of 1933[2] and article 33A(1) of the Texas Securities Act.[3]

The district court found that Pinter's failure to register the securities purchased by plaintiffs was unlawful and permitted plaintiffs to recover the purchase price of the unregistered securities plus interest less investment income. Pinter maintains that because of his promotional activities Dahl, too, is liable as a "seller" of unregistered securities under section 12(1) and article 33A(1) and thus should be accountable to Pinter in contribution for the amounts awarded to the other plaintiffs. Further, Pinter argues that Dahl should be barred from any personal recovery from Pinter under the

[2] Section 12(1) provides:

> Any person who — offers or sells a security in violation of section 77e of this title . . . shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

15 U.S.C. §77e. Title 15 U.S.C. §77e provides, in pertinent part, that if a security is unregistered it is unlawful for a person, directly or indirectly, to use the mails to sell or deliver the security.

[3] Article 33A(1) provides:

> A person who offers or sells a security in violation of Section 7, 9 (or a requirement of the Commissioner thereunder), 12, 23B, or an order under 23A of this Act is liable to the person buying the security from him, who may sue either at law or in equity for rescission or for damages if the buyer no longer owns the security.

Texas Ann. Civ. Stat. art. 581-33 (Vernon Supp. 1986).

equitable doctrines of *in pari delicto*, estoppel and unclean hands.

II.

A. *Availability of Equitable Defenses*

[1] In *Henderson v. Hayden*, 461 F.2d 1069 (5th Cir. 1972), this court determined that a plaintiff seeking a return of consideration paid for unregistered securities under section 12(1) could not be estopped by virtue of his having been aware that the securities were unregistered.

> We cannot say that in the present appeal rescission would frustrate the Act's purpose. While one of the essential purposes of the Act is to protect innocent purchasers of securities . . . and though [plaintiff] is certainly not the average innocent investor,[4] nevertheless, allowing him to recover clearly will not frustrate the legislative purpose. . . . Congress sought to encourage sellers of securities to register those securities prior to any sales or offers to sell. By allowing recoveries such as the one in this case unregistered sales are discouraged. Thus it is apparent that [plaintiff] may recover from [defendants].

461 F.2d at 1072 (footnote added). The plaintiff in *Henderson* was at least as sophisticated a buyer as Dahl. His state of awareness regarding the seller's failure to register was, as far as we can tell, identical to Dahl's. There is no evidence indicating that Dahl bought the securities knowing that Pinter's failure to register violated federal statute.

[4] Plaintiff was a highly sophisticated and successful investor who devoted his full time to managing his investment portfolio.

[2] The facts of *Henderson* are, in every material respect, indistinguishable from the facts of the cast at bar. We forestall reliance on *Henderson* as controlling precedent, however, pending a determination whether it has been displaced by a recent Supreme Court Case, *B. Eichler, H. Richards, Inc. v. Berner*, 472 U.S. ___, 105 S.Ct. 2622, 86 L.Ed. 2d 215 (1985).

[3] In *Eichler* the Supreme Court established that the doctrine of *in pari delicto* will bar a plaintiff's recovery in a section 10(b) action under the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), when:

> (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and
>
> (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investment public.

Id. at ___, 105 S.Ct. at 2629, 86 L.Ed. at 224. Unlike the standard employed in *Henderson* which focuses on whether preclusion of suit would further the goals of securities legislation, the *Eichler* test queries whether preclusion of suit would interfere with enforcement of the legislation. If *Eichler* applies to a section 12(1) action as well as to a section 10(b) action, it appears that *Henderson* would no longer be valid precedent.

[4] The *in pari delicto* doctrine eminates from the Latin expression, "*in pari delicto est conditio defendentis*(In a case of equal or mutual fault . . . the position of the [defending party] is the better one)."[5] The doctrine is a corollary of the unclean hands maxim, the principal difference being that the *in pari delicto* doctrine technically applies only when the plaintiff's fault is substantially equal to the defendants. Not

[5] Black's Law Dictionary 711 (5th ed. 1979).

any act suffices to bring into play the doctrines of *in pari delicto* and unclean hands. As the Supreme Court points out in *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240 (1933), the doctrines apply "only where some *unconscionable* act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation." *Id.* at 245 (emphasis supplied). The unclean hands and *in pari delicto* maxims operate against conduct which is contrary to the dictates of good conscience or fair dealing. 2 Pomeroy, *Equity Jurisprudence*, 92-94 (5th ed. 1941); *United States v. Second National Bank of North Miami*, 502 F.2d 535, 548 (5th Cir. 1974), *cert. denied*, 421 U.S. 912 (1975); *Deseret Apartments v. United States*, 250 F.2d 457 (10th Cir. 1957); *see also United States v. T-12 Garden Apartments*, 703 F.2d 900 (5th Cir. 1983). Moreover, the maxims refer "to willful misconduct rather than to merely negligent conduct. The improper conduct which falls within the maxim must involve intention as opposed to an inadvertent act or a misapprehension of legal rights; the conduct must be morally reprehensible as to known facts." 30 C.J.S. *Equity* §95, at 1022 (1965); (citations omitted); *Preload Technology, Inc. v. A.B. & J. Construction Co.*, 696 F.2d 1080 (5th Cir. 1983).

[5] Unlike section 10(b) which contains an element of scienter, section 12(1) is a strict liability offense. *Swenson v. Engelstad*, 626 F.2d 421, 424 (5th cir. 1980). Pinter is liable thereunder notwithstanding the fact that it probably misapprehended its duty to register. Dahl, also unaware of Pinter's duty to register, was as "culpable" as Pinter in the sense that his conduct was an equal producing cause of the illegal transaction, in short, in the sense that he was equally non-culpable. Causation, however, does not create unclean hands nor does equal causation constitute equal fault. Absent a showing that Dahl's conduct was "offensive to the dictates

of natural justice," *Keystone Driller*, 290 U.S. at 25, the *in pari delicto* and unclean hands are not available.

[6] Remaining to be decided is whether Pinter may defend on grounds of estoppel, and in this regard whether *Eichler*, precluding suit when preclusion would not interfere with the enforcement of the securities laws, or *Henderson*, precluding suit only when preclusion would further the goals of the securities laws, is the governing standard. We believe that *Henderson* supplies the appropriate standard and, thus, the controlling authority in this case.[6] By its own terms, the *Eichler* standard applies when "damages [are sought to] be barred on the grounds of the plaintiff's own culpability," a condition not present under our facts. *Eichler*, 472 U.S. at __, 105 S.Ct. at 2629, 86 L.Ed. at 224. Additional evidence of *Eichler's* limited applicability lies in the fact that the second prong of *Eichler* substantially mirrors the classic formulation of the *in pari delicto* doctrine. As the Court explains, "[t]he defense is grounded on two premises: first, that courts should

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[6]Even if we were to apply the *Eichler* standard, Dahl would still be permitted to recover under section 12(1). In *Eichler* a tippee who voluntarily and, under the facts assumed by the Supreme Court, knowingly traded on inside information was permitted to go forward with his section 10(b) suit against the tipper. First, the Court found that barring private actions in cases such as this would "inexorably result in a number of fraudulent practices going undetected by the authorities and unremedied." 472 U.S. at __, 105 S.Ct. at 2631, 86 L.Ed.2d at 227. Second, the Court reasoned that defendants would be more responsive to the deterrent pressure of potential sanctions because they made the first step in the chain of dissemination and were also more likely to be advised by counsel. We believe that the *Eichler* Court's analysis applies with equal force to the case at bar. We also note that allowing section 12(1) suits for rescission when the plaintiff is unaware that the securities are unregistered in violation of federal law is unlikely to induce plaintiffs to enter into illegal transactions.

not lend their good offices to mediating disputes among wrongdoers; and second, that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality." *Id.* at __, 105 S.Ct. at 2625-26, 86 L.Ed. at 221-22. Traditionally, the *in pari delicto* has been precluded where "there may be on the part of the court itself a necessity of supporting the public interests or public policy in many cases, however reprehensible the acts of the parties may be." 1 J. Story, *Equity Jurisprudence* 305 (13th ed. 1886), *quoted in Eichler*, 472 U.S. at __, 105 S.Ct. at 2627, 86 L.Ed.2d at 222. A plaintiff with unclean hands, in essence, must overcome a presumption that entertainment of his suit would not serve the public interest; and, in accordance with this principle, *Eichler* permits the application of the *in pari delicto* doctrine in the context of securities regulation when "preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public." *Eichler*, 472 U.S. at __, 105 S.Ct. at __, 86 L.Ed.2d at 224.

[7] The law imposes no such presumption on Dahl. The issue in this case is not how the parties' legal relationship should be structured in order to give maximal effect to the two independent values undergirding the unclean hands doctrine and the federal securities laws. In contrast to the unclean hands and *in pari delicto* defenses, the estoppel theory asserted by Pinter has no independent existence in principles of judicial integrity but arises exclusively from within the relationships that are regulated by federal statute. The issue, then, is simply whether section 12(1), providing for a general right to rescind a sale of securities not registered in compliance with the 1933 Act, may, in the context of federal securities law, be fairly construed as applying only to purchasers who do not know their securities are unregistered. In interpreting the scope of a statutory provision, courts have

developed numerous aids to construction, one being whether an unprovided-for sanction or remedy "further[s] the essential purpose of the enactment." *See A. C. Frost & Co. v. Coeur D'Alene Mines Corp.*, 312 U.S. 43 (1940). We believe that *Henderson*, which posed the question whether allowing plaintiff's suit accordance with the express provisions of section 12(1) would frustrate the purposes of the Securities Act of 1933, is a sound construction and conclude that the district court's failure to allow Pinter's asserted equitable defenses was not erroneous.[7]

Because we find that Dahl has a right to recover from Pinter under federal law, we need not decide whether Pinter's asserted defenses would bar Dahl's recovery under state law.

B. *Availability of Contribution*

In our decision to permit rescission by Dahl, we have relied heavily upon the absence of any evidence indicating that Dahl possessed knowledge of the illegality of Pinter's failure to register. We reiterate, however, that this fact is irrelevant in

[7] In deciding this issue adversely to Pinter we have not lost sight of the fact that Dahl was involved in solicitations of sales to the remaining plaintiffs. We find in the second part of this opinion, however, that these solicitations were not wrongful; they cannot, therefore, give rise to the defenses asserted by Pinter. Moreover, even if these solicitations were wrongful we fail to discern how Dahl's conduct with respect to sales which were wholly independent of his own purchases from Pinter affect the rationale adopted by this court in *Henderson*. Dahl, after all, is not seeking to recover for Pinter's failure to register the securities it sold to the other plaintiffs. He seeks to recover only the purchase price of his own securities and, with respect to those purchases, Dahl's conduct as a buyer was not wrongful. Dahl had no knowledge that the securities were required to be registered nor was Dahl's purchase of the securities in furtherance of any securities violations against third parties.

deciding whether Dahl is a "seller" of securities.[8] Under section 12(1) the liability of a "seller" of unregistered securities is absolute in the sense that it is not predicated upon knowledge that registration was legally required. *Swenson v. Engelstad*, 626 F.2d 421, 424 (5th Cir. 1980); *Lynn v. Caraway*, 252 F. Supp. 858 (W.D. La. 1966), *aff'd per curiam*, 379 F.2d 943 (5th Cir. 1967), *cert. denied*, 393 U.S. 951 (1986).

[8] A "seller" is (1) one who parts with title to securities in exchange for consideration or (2) one whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place. *Swenson v. Engelstad*, 626 F.2d at 426-27; *Pharo v. Smith*, 621 F.2d 656, 667 (5th Cir. 1980); *Hill York Corp. v. American International Franchises, Inc.*, 448 F.2d 680, 692-93 (5th Cir. 1971).

[9] We have no difficulty finding that Dahl's conduct was a "substantial factor" in causing the other plaintiffs to purchase securities from Pinter. No plaintiff had any familiarity with the Pinter oil and gas interests until contacted by Dahl. Dahl represented to these plaintiffs that based on his own investigations the investments could not lose. And, with

[8] None of the other plaintiffs has sought to recover from Dahl. Dahl's liability on their claims therefore is in issue only if contribution is a remedy available to Pinter. While no code section specifically allows for a right of contribution against a "seller" in Dahl's position, section 16 of the Securities Act of 1933, 15 U.S.C. §77p, provides for "such additional right and remedies that may exist at law or in equity." For the purposes of this analysis, we assume, without deciding, that Pinter is entitled to a right of contribution under federal law. In so doing, we emphasize that this opinion does not stand for the proposition that contribution is an appropriate remedy under these facts. In light of the clear purpose of section 12(1) to disgorge the purchase price from the seller of unregistered securities, we view as unsound any result which would permit Pinter to retain part of the consideration paid by plaintiffs.

the exception of Grantham, the plaintiffs relied exclusively upon communications with Dahl in making their decision to purchase the securities. The district court found, moreover, that all plaintiffs but Grantham "decided to invest because of Dahl's involvement" and that "Dahl, not Pinter, was the person who caused [Grantham] to purchase."

[10] Notwithstanding our conclusion that Dahl meets the substantial factor test, we decline to hold that he is a "seller" for the purposes of section 12(1). The substantial factor test was formulated and has been applied under facts which differ substantially from the facts of this case. In every case we have found employing this test (or its substantial equivalent), the person sought to be held liable as a "seller" received or hoped to receive some financial benefit from his efforts. *See, e.g., Junker v. Crory*, 650 F.2d 1349 (5th Cir. 1981) (corporate attorney acting in capacity as agent of seller); *Croy v. Campbell*, 624 F.2d 709 (5th Cir. 1980) (attorney-accountant who was paid for investment advice); *Lewis v. Walston & Co.*, 487 F.2d 617 (5th Cir. 1973) (investment broker); *Hill York Corp.*, 448 F.2d 680 (compensated agents of the issuer). We believe that had this circuit previously been confronted with a promoter of unregistered securities whose efforts were intended to benefit neither the seller nor himself, we would have created a different test. That test would have incorporated a threshold requirement that the promoter be motivated by a desire to confer a direct or indirect benefit on someone other than the person he has advised to purchase. We believe that a rule imposing liability (without fault or knowledge) on friends and family members who give one another gratuitous advice on investment matters unreasonably interferes with well-established patterns of social discourse. Absent express direction by Congress, we decline to impose liability for mere gregariousness.

As for Pinter's argument that Dahl is a "seller" under Texas securities law, we find that Texas' test for liability is substantially in accord with that which we adopt today in the federal arena. In *Stone v. Enstam*, 541 S.W.2d 473 (Tex. Civ. Appl. — Dallas 1976, no writ), the Texas Court of Civil Appeals found that an individual who, without benefit to himself, "volunteered" to find someone who would sell stock to a prospective buyer, was not a "seller" within the meaning of article 33A. Dahl was clearly no more than a "volunteer" and therefore is not liable under Texas law to the other plaintiffs.

There being no liability under either federal or state law upon which a right of contribution in favor of Pinter may be predicated, we find that the district court's refusal to assess damages against Dahl was correct.

AFFIRMED.

JOHN R. BROWN, Circuit Judge, dissenting.

The Court today has reached a result allowing a plaintiff to take refuge in the protections provided by federal and state securities law even when the plaintiff participates in those violations to an equal or greater extent than the defendant. Because I find this result contrary to settled law and unsound as a matter of securities policy, I must respectfully dissent from the Court's opinion.

It is settled law that a securities case plaintiff may be denied recovery on the basis of the *in pari delicto* defense. *B. Eichler, H. Richards, Inc. v. Berner*, 472 U.S. ___, 86 L.Ed.2d 215, 105 S.Ct. 2622 (1985); *Kuehnert v. Texstar Corp.*, 412 F.2d 700 (5th Cir. 1969). In *Eichler* the Supreme Court ruled that a private action for damages under the federal securities laws may be barred on the grounds of the plaintiff's own culpabil-

ity where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public. *Eichler*, 472 U.S. at ___, 86 L.Ed.2d at 224, 105 S.Ct. at 2629.

Dahl's conduct in this case gives rise to two theories under which the *in pari delicto* defense operates to bar his recovery under either Texas law or the 1933 Act. First, Dahl's conduct in exhorting the other plaintiffs to invest transformed him into a "seller" of unregistered securities. In other words, his conduct put him in the same boat as Pinter, from whom Dahl is attempting to recover in this case. Second, in addition to "selling" unregistered securities, Dahl knowingly purchased unregistered securities from Pinter. In fact, Dahl was the primary mover — the "catalyst" — even with respect to his own purchases.[1]

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[1] With respect to either of these two theories, whether or not Dahl also knew of the *illegality* of selling unregistered securities — which the majority apparently considers to be of some importance — is irrelevant. Knowledge of illegality plays no part in §12(1) liability for "selling" unregistered securities. Knowledge that they are not registered is enough. *See Swenson v. Engelstad*, 626 F.2d 421 (5th Cir. 1980).

With respect to the theory that Dahl's knowing purchase raises the *in pari delicto* bar, Texas law provides that a plaintiff's knowing participation in the sale of unregistered securities by *purchasing* makes the plaintiff equally culpable and, therefore, *in pari delicto*. *Ladd v. Knowles*, 505 S.W.2d 662, 668 (Tex. Civ. App. 1974). The Court in *Ladd* makes no mention of an additional requirement that the plaintiff must know of the *illegality* of the transaction. Moreover, the Court has cited no case law which indicates that knowledge of illegality (as opposed to mere knowledge that the securities are unregistered) is necessary. In any event, it is hard for me to believe — on this record — that a sophisticated investor such as

The Fifth Circuit test for determining whether Dahl is a "seller" under §12(1) or §12(2) of the 1933 Act is whether the injury to the plaintiff flows directly and proximately from the actions of Dahl. *See Hill York Corp. v. American International Franchises, Inc.*, 448 F.2d 680, 692-93 (5th Cir. 1971). In applying this test, the Court in *Hill York* ruled that certain persons fell within the letter and spirit of the test because they were the "motivating force" behind the promotion and "did everything but effectuate the actual sale." *Id.* at 693. In *Lewis v. Walston & Co., Inc.*, 487 F.2d 617 (5th Cir. 1973), we again discussed how parties who participate in the negotiations of or arrangements for the sale of unregistered securities "sell" those securities within the meaning of §12(1) of the 1933 Act. The *Lewis* court ruled that the "proximate cause" aspect of the *Hill York* test is satisfied if the alleged seller's actions are a "substantial factor" in bringing about the plaintiff's purchases.

The findings in the present case clearly indicate that Dahl was a "substantial factor" in bringing about the other plaintiff's purchases and is therefore a seller. As the majority opinion correctly recognizes, no plaintiff had any familiarity with the Pinter oil and gas interests until contacted by Dahl, and all but one relied exclusively upon communications with Dahl in deciding to purchase the securities. The District Court even found that it was Dahl and not Pinter who caused the other plaintiffs to purchase. Notwithstanding all these findings as well as the majority's conclusion that Dahl meets the

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Dahl did not know of the illegality of selling unregistered securities. In fact, each investment letter-contract, which Dahl helped the other purchasers complete, contained language expressly indicating that the securities were not registered because of the expected availability of a limited offering exemption from registration. Knowledge of the potential availability of an exemption certainly indicates awareness of the requirements of the securities laws.

substantial factor test, this Court declines to hold that Dahl is a "seller."

The Court's determination that a "seller" should include only those whose efforts were intended to benefit themselves in some manner is wholly without support in law and flies in the face of the policy underlying the securities registration laws. Securities law is concerned with the *protection of the public.* The public may be injured (as happened here) by a careless "seller" of unregistered securities whether there is something in it for the seller or not. In other words, it is Dahl's *conduct* that endangered the public regardless of his state of mind. Thus, the majority's weak attempt to distinguish the "substantial factor" cases by pointing out that the "sellers" in those cases had some expectation of financial benefit has no more foundation in securities law and policy than a distinction based on the color of the seller's hair or the size of his tennis shoes.[2] The opinions which the majority distinguishes do not in any way indicate that financial benefit was a factor in the decision of those cases. The Court in this case is inventing new law that threatens to undermine the protections provided to the public by the securities laws.[3]

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[2] The Court's suggested distinction is further undercut by its own general definition of "seller." According to the Court (and an abundance of Fifth Circuit precedent), a "seller" is (1) one who parts with title to securities in exchange for consideration *or* (2) one whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place. How strange that one part of the definition expressly requires that a seller receive consideration while any mention of consideration is conspicuously absent from the "substantial factor" element of the definition.

[3] Moreover, the Court's finding that Dahl expected no financial benefit from his efforts has no basis in the record or common sense. More investors means that the investment program receives the requisite amount of financing at a smaller risk to each investor.

The Court's concern with imposing liability on friends and family members who give one another gratuitous advice is a herring, red or otherwise. Merely offering advice or informal investment suggestions will rarely meet the "motivating force" or "substantial factor" test thereby transforming an optimistic investor into a "seller." In the situation at hand, Dahl's conduct went far beyond giving gratuitous advice. For all practical purposes he *was* the seller in the literal sense of the word — moreso even than Pinter. Furthermore, *if* a friend or relative's conduct converts him into a "seller" under established law, why shouldn't the purchasers be able to invoke the protection of the securities laws and sue him? They may choose not to, even when the friend's conduct is as aggressive as Dahl's was here. This is their prerogative, but purchasers should at least have the ability to invoke the securities laws, if they so choose, to sue a friend whose conduct was a substantial factor in causing their injury. In most cases, disgruntled friends and relatives of someone like Dahl will probably do exactly what the plaintiffs did here — go after the "issuer" (Pinter). In any event, the issue on this appeal is not whether we should allow a friend or relative to sue Dahl, but whether we should let Dahl recover from Pinter even though Dahl was equally if not more at fault for the securities violations. In my view, we should *not.*

In addition to being a seller of unregistered securities and therefore in the same boat as Pinter, Dahl's status as a knowing purchaser — in fact, his status as a catalyst for the entire transaction — is another basis on which the *in pari delicto* defense operates to bar his recovery. *See Ladd v. Knowles,* 505 S.W.2d 662 (Tex. Civ. App. 1974); *see also Kuehnert v. Texstar Corp.,* 412 F.2d 700, 703 (5th Cir. 1969)

Therefore, I cannot believe that Dahl was completely free of self-interest when he exhorted the other purchasers to invest.

("This is not a case of mere knowledge of another party's wrongdoing, without active participation."); Godfrey, *Plaintiff's Conduct as a Bar to Recovery Under the Securities Acts: In Pari Delicto*, 48 Tex. L. Rev. 181, 192-94 (1969) (recognizing that more than mere knowledge may be required under the federal securities law for the *in pari delicto* defense to bar a purchaser's recovery, but concluding that acting as a catalyst for the violation clearly goes beyond mere knowledge). In *Ladd* the Court expressly held that if transactions are illegal solely because the stock is unregistered, a plaintiff's knowing participation in the sale — for example, by *purchasing* the stock — makes the plaintiff equally culpable with the seller and, therefore, *in pari delicto*. 505 S.W.2d at 668 (emphasis added).

My brethren cite a Fifth Circuit case, *Henderson v. Hayden*, 461 F.2d 1069 (5th Cir. 1972), for the proposition that knowledge that securities are unregistered does not estop a plaintiff from prevailing under §12(1). This is no longer a persuasive case as it does not reflect the current state of *in pari delicto* law. *See B. Eichler, H. Richard, Inc. v. Berner*, 472 U.S.___, 86 L.Ed.2d 215, 105 S.Ct. 2622 (1985). Technically, it is not even an *in pari delicto* case — it just looks like one. The Court in *Henderson* did not even discuss the issue of "equal culpability," the cornerstone of an *in pari delicto* defense. Rather, the decision in *Henderson* was based on a very general policy-oriented principle which stated that a plaintiff should not be allowed rescission under §12(1) if that rescission would frustrate the Act's purpose. 461 F.2d at 1072. Subsequent case law in the Fifth Circuit and the Supreme Court which *specifically* discusses the *in pari delicto* defense declares that the crucial question is not whether *rescission* will frustrate the Act's purposes but whether *denying rescission* will. *B. Eichler, H. Richard, Inc. v. Berner*, 472 U.S.___, 86 L.Ed.2d 215, 224, 105 S.Ct. 2622, 2629 (1985); *Woolf v. S.D. Cohn & Co.*, 515 F.2d 591, 602-05 (5th Cir. 1975), *vacated and remanded on other grounds*, 426 U.S. 944, 96 S.Ct. 3161, 49 L.Ed.2d 1181 (1976). In other words, given that the plaintiff and defendant are equally culpable for the violation, the proper inquiry is whether the Act's purposes will be frustrated by allowing *in pari delicto* to be used as a defense to rescission in a particular case.

The correct formulation of the rule, according to the Supreme Court, is that a private securities action may be barred on the ground of a plaintiff's own culpability where:

> (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and
>
> (2) *preclusion* of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investment public.

B. Eichler, H. Richard, Inc. v. Berner, 472 U.S.___, 86 L.Ed.2d 215, 224, 105 S.Ct. 2622, 2629 (1985) (emphasis added). *Accord Woolf v. S.D. Cohn & Co.*, 515 F.2d 591, 602-03 (5th Cir. 1975), *vacated and remanded on other grounds*, 426 U.S. 944, 96 S.Ct. 3161, 49 L.Ed.2d 1181 (1976). [4]

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[4]There are many problems with the majority's reasoning inits effort to apply *Henderson* instead of *Eichler*. The source of the problems seems to be the majority's treatment of Pinter's affirmative defense as some generic form of "estoppel theory" rather that as an *in pari delicto* defense. The issue in this case — the issue which has been briefed and orally argued — is whether the *in pari delicto* defense bars Dahl's recovery from Pinter. The Court's confusion of the issue is apparent in its argument that *Eichler* is of limited applicability here because the second part of the *Eichler* rule substantially mirrors the classic formulation of the *in pari delicto* doctrine. How does that make *Eichler* inapplicable? The case presently on appeal *is* an *in pari delicto* case and *Eichler is* therefore directly applicable. Perhaps the majority has been forced to

Dahl's conduct in this case fits the test under either the "seller" theory or the "knowing purchaser" theory. Dahl is as responsible as Pinter (probably moreso) with respect to the sales to the other plaintiffs as well as with respect to his own

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reformulate the issue because *Henderson*, on which the majority rests its decision, is *not* an *in pari delicto* case. As I have emphasized, *Henderson* does not even discuss "equal culpability," the cornerstone of an *in pari delicto* defense.

The majority recognizes that *Eichler* applies when "damages [are sought to] be barred on the grounds of the plaintiff's own culpability," but then erroneously concludes that this in not such a case. This is *precisely* such a case. Pinter expressly claims in his brief that Dahl's recovery should be barred because of Dahl's own culpability. Elsewhere in the opinion, the Court admits that Dahl was as "culpable" as Pinter as a producing cause of the illegal transaction. This observation places Dahl squarely within the *Eichler* formulation of the *in pari delicto* doctrine. Under *Eichler*, the first element of the *in pari delicto* defense is that the plaintiff must bear "at least substantially equal responsibility for the violations he seeks to redress." 472 U.S. at ___, 105 S.Ct. at 2629, 86 L.Ed.2d at 224. Dahl bears at least substantially equal responsibility for the securities violations in this case, as the majority recognizes in stating that Dahl was as "culpable" as Pinter as a producing cause of the illegality.

Finally, any application of *in pari delicto* principles in this appeal is incomplete without discussing Dahl's conduct as a "seller" of unregistered securities in addition to his conduct as a knowing purchaser. The majority has discussed the "seller" issue only in the context of contribution, a discussion with which I also take issue elsewhere in my opinion.

In sum, the majority has declined to apply recent Supreme Court precedent which is directly on point — there is absolutely nothing in *Eichler* which indicates that the general *in pari delicto* rules espoused therein are limited to a §10(b) action, as the majority of this panel apparently implies. Instead, this Court finds that the controlling precedent for this *in pari delicto* appeal is found in a 1972 Fifth Circuit case which is not even an *in pari delicto* case.

purchase. Dahl was the prime mover in the sales to the other plaintiffs. The District Court even found that he, and not Pinter, caused all the other plaintiffs to invest. The record also shows that Dahl was the "catalyst" even for his own investment in unregistered securities. He approached Pinter, carefully studied the drilling logs, and wanted in. And, of course, Dahl knew that the securities were unregistered.

Not only was Dahl equally culpable, but the purpose of the securities laws will not be disserved by barring his recovery. In fact, the enforcement of the securities laws and the protection of the public will be promoted. We do not want sophisticated oil and gas investors such as Dahl going around "selling" unregistered securities to less knowledgeable investors. The "public" which we should be concerned about protecting in this case is not Dahl but the less informed people that he pulled into the venture. They should be able to recover from either Dahl or Pinter, but Dahl should be barred from recovering from Pinter. [5]

Fifth Circuit case law also indicates that the securities laws may be flustered if plaintiffs such as Dahl are allowed to put themselves in no-lose situations by virture of their knowledgeable participation in securities violations. *See Kuehnert v. Texstar Corp.*, 412 F.2d 700 (5th Cir. 1969). This is exactly

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[5]Barring Dahl's recovery will not let Pinter off the hook because of the presence of the other plaintiffs who have already successfully litigated their claims against Pinter. Thus, allowing the *in pari delicto* defense to be used in this case results in the best possible outcome — both Dahl and Pinter must "pay" — that is, bear the burden — for the violation for which they are both responsible. The best way to protect the public in this case is to discourage the actions of both Dahl and Pinter as well as future Dahls and Pinters.

Indeed, I would go further. I would hold that Pinter is entitled to contribution from Dahl since Dahl is at least equally culpable for the sale to the other plaintiffs.

what Dahl did when he knowingly purchased unregistered securities — he put himself in a no-lose situation by acquiescing in, and being the catalyst for, a securities law violation. If the investment had paid off, Dahl would be at home counting his money instead of in court suing Pinter. Instead, the investment was a flop and Dahl sought to invoke the protection of the very laws which were violated primarily because of his own conduct. The securities laws were not meant to serve as a safety valve so sophisticated investors such as Dahl can, in the war weary but still vivid phrase, "have their cake and eat it too." Allowing this fence-sitting to occur will encourage securities law violations. Thus, it cannot be said that precluding Dahl's recovery would interfere with the effective enforcement of the securities laws. Quite the contrary, it would promote effective enforcement because it would discourage those who act as a "catalyst" for securities violations in the hope of placing themselves in a no-lose situation.

In a nutshell, I believe that a fair application of the Supreme Court rule in *Eichler* yields a result at odds with the decision handed down today. Dahl bears at least substantially equal responsibility for the violations he seeks to redress, and barring his recovery works no interference with the effective enforcement of the securities laws and the protection of the public. In fact, as I have attempted to show, public protection and effective enforcement would be promoted by finding Dahl's recovery blocked by the *in pari delicto* defense. Therefore, I must respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MAURICE DAHL, GARY CLARK, W. GRANTHAM, ROBERT DANIELE, CHARLES DAHL, DOWAYNE BOCKMAN, RAY DILBECK, RICHARD KOON, ART OVERGARRD, JACK YEAGER, ACCRA TRONICS SEALS CORP., AND AARON HELLER,

Plaintiffs-Appellees,

v.

BILLY J. "B. J." PINTER, BLACK GOLD OIL COMPANY, PINTER ENERGY COMPANY, and PINTER OIL COMPANY,

Defendants-Appellants.

No. 84-1970

OPINION

Filed July 21, 1986

Before: John R. Brown, Thomas M. Reavley, and Robert M. Hill, Circuit Judges.

Per Curiam; Dissent by Judge Edith H. Jones, with whom Clark, Chief Judge, Gee, Jolly, Higginbotham, and Davis, join

Appeal from the United States District Court
for the Northern District of Texas
A. Joe Fish, District Judge, Presiding

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion April 18, 1986, 5th Cir., 1986, 787 F.2d 985)

OPINION

PER CURIAM:

A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is denied.

Before Clark, Chief Judge, Gee, Rubin, Reavley, Politz, Randall, Johnson, Williams, Garwood, Jolly, Higginbotham, Davis, Hill, and Jones.

EDITH H. JONES, Circuit Judge, with whom Clark, Chief Judge, Gee, Jolly, Higginbotham, and Davis, Circuit Judges, join, dissenting from denial of rehearing en banc:

I must respectfully dissent from the Court's decision denying rehearing en banc. I do not agree that the panel majority and Judge Brown's dissent differ only in application of settled law to the facts. Quite the contrary, the chasm between the majority and dissenting opinions is strictly one of law.

First, the majority opinion changes the law regarding the definition of a "seller" of securities. The long-standing Fifth Circuit test for identifying a "seller" under the 1933 Act is whether the alleged seller's conduct was a "substantial factor" in causing the purchase. *See Hill York Corp. v. American International Franchises, Inc.*, 448 F.2d 680 (5th Cir. 1971); *Lewis v. Walston & Co., Inc.*, 487 F.2d 617 (5th Cir. 1973). This Court's seminal decisions in *Hill York* and *Lewis* have been widely cited and followed by other circuits. *See, e.g., S.E.C. v. Murphy*, 626 F.2d 633 (9th Cir. 1980); *Stokes v. Lokken*, 644 F.2d 779 (8th Cir. 1981); *Davis v. Avco Financial Services, Inc.*, 739 F.2d 1057 (6th Cir. 1984), *cert. denied*, 105 S.Ct. 1359 (1985). The panel majority specifically found that Dahl met the "substantial factor" test, yet declined to hold that he was a "seller," because, according to the majority, Dahl had no

expectation of financial benefit. Until this opinion, expectation of financial benefit played no role — express or implied — in the determination of "seller" status. According to the majority, the test is no longer "substantial factor" but "substantial factor *plus* expectation of financial benefit." As Judge Brown stated in his dissent, this new restriction has absolutely no foundation in either settled securities law or its underlying policies.

I sympathize with the panel's evident concern regarding an overly broad definition of "seller" lest a cocktail conversation should lead to unwarranted liability under section 12(1) of the 1933 Act. Dahl, however, was performing a role far more significant than that of "happy hour investment advisor." The policy behind the "substantial factor" test, unadulterated by the majority's gloss, is fully satisfied by holding Dahl to be a "seller." We need not speculate, therefore, on how a true cocktail conversationalist might defend himself consistent with that test.

The second major divergence between the majority opinion and the dissent is also purely one of law. The majority declines to apply a recent Supreme Court case which, in the context of a private cause of action for a securities violation, fashions an explicit test for allowance of the *in pari delicito* defense. *See B. Eichler, H. Richard v. Berner*, 472 U.S. ___ 86 L.Ed.2d 215, 105 S.Ct. 2622 (1985). Rather, the majority ruled that the disposition of the *in pari delicto* issue raised on this appeal was controlled by a venerable Fifth Circuit case which, as correctly pointed out by the dissent, does not even discuss the *in pari delicto* defense. The majority's confusion regarding the controlling principles of law is evident in its hapless attempt to distinguish *Eichler* on the grounds that the *Eichler* test "mirrors the classic formulation of the *in pari delicto* doctrine." Finally, the majority apparently suggests that *Eichler* should be confined to section 10(b) actions. *Eichler* does

not remotely suggest such a result. In fact, it was conceded in *Eichler* does not remotely suggest such a result. In fact, it was conceded in *Eichler* that the *in pari delicto* defense should be available when Congress expressly provides for private remedies (e.g., actions under the 1933 Securities Act); the issue for decision was whether the defense should be unavailable when the private cause of action is implied (e.g., a Rule 10b-5 action). The Supreme Court rejected this distinction, ruling that the *in pari delicto* doctrine applies to implied causes of action under the federal securities laws as well as to private causes of action expressly provided for by Congress. 86 L.Ed. at 223-24, 105 S.Ct. at 2628. Thus, any reasonable reading of *Eichler* indicates that its formulation of the *in pari delicto* defense applies to actions instituted under the '33 Act as well as actions brought pursuant to 10b-5.

In sum, the panel majority has erred in its choice of controlling legal principles rather than its application of settled law to the facts. The practical implication of its error is obvious. A fence-straddler, such as Dahl, can promote and participate in an illegal sale of unregistered securities and, if the investment does not pay off, turn around and sue the issuer to recover his investment. This lamentable result may actually encourage future violations, thereby thwarting federal securities policy. Finally, in light of the panel majority's cloudy discussion of the *in pari delicto* doctrine, I am left wondering about the doctrine's current place in this Circuit's law. Are we really holding that the *Eichler* formulation of the *in pari delicto* doctrine does not apply to actions arising under the 1933 Act? Do we have any valid rationale for doing so? If not, on what basis are we to decide whether to apply *Eichler* in future cases? Reshaping the law in order to reach a predetermined desired outcome has created an ill-conceived precedent on two significant legal issues affecting securities litigation. Believing that it is our duty to refrain from such

reshaping and to follow the obvious lead of the Supreme Court in *Eichler*, I dissent from the Court's denial of rehearing en banc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MAURICE DAHL, ET AL.,
Plaintiffs,

vs.

BILLY J. "B.J." PINTER, ET AL.,
Defendants.

CIVIL ACTION No.
CA 3-82-1876-G

MEMORANDUM OF DECISION

This case was tried without a jury on May 21-24, June 22, and July 12, 1984. In accordance with Rule 52(a), Fed. R. Civ. P., the court makes the following findings of fact and conclusions of law.

Findings of Fact

1. The matter in controversy arose out of the sale of certain oil and gas interests by defendants to plaintiffs.

2. At the time this suit was filed, all plaintiffs, except Grantham (and possibly Bockman and Maurice Dahl), were citizens of the state of California. Grantham was a citizen of Texas, Bockman a citizen of either California or Great Britain, and Maurice Dahl a citizen of either California or Texas.

3. Defendants were at all relevant times citizens of the state of Texas.

4. Prior to his purchase of the fractional undivided oil and gas interests of which he complains in this suit, plaintiff Maurice Dahl ("Dahl") was engaged in real estate brokerage and investments in the state of California. His net worth

exceeded $1 million and his annual income approached $250,000.

5. Before his involvement with Pinter in this case, Dahl had invested in two other "oil deals." In 1980-81 he formed two closely held corporations, Wrangler Oil Company and Puma Petroleum, Inc., to acquire and hold royalty and working interests in oil and gas properties. Dahl's first experience in the oil and gas business was through Ed Miner, whom he had known in the real estate business. Miner first introduced Dahl to Lone Star Petroleum, with which Dahl placed an investment of about $7,000. Although Dahl was informed at the time that the wells were successful, he never received income from them and later learned that the whole operation was bogus.

6. Miner next proposed that Dahl obtain leases through Puma Petroleum. Miner found two leases, one in Nevada, Oklahoma and the other on an Indian reservation in northern Oklahoma. Dahl never drilled a well on either lease. One expired, and he sold the other for about half its original cost.

7. As a result of these abortive efforts to enter the oil and gas business, Dahl became dissatisfied with Miner. He hired Dean Kirk for the purpose of locating and acquiring oil and gas properties. Through Puma Petroleum, Dahl funded Kirk's rental of office space and other incidental expenditures for several months while Kirk actively searched for oil deals in Texas and Oklahoma in which Dahl could invest.

8. Kirk introduced Dahl to Pinter. Initially, Dahl learned most of what he knew about Pinter from Kirk. Kirk informed Dahl that Pinter was a highly regarded and successful oil and gas operator in Texas and Oklahoma.

9. Apparently impressed by Kirk's comments concerning Pinter, Dahl discussed with Pinter his interest in acquiring oil

and gas properties. Pinter initially said he could acquire leases for Dahl in November or December of 1980 but that he was obligated to other investors. Dahl gave Pinter $20,000 to acquire leases upon the understanding that the leases were to be held in Black Gold's name, with Dahl having a right of first refusal to drill one or more offset wells in the future.

10. Dahl toured the properties several times, frequently without Pinter, so that he could talk to others and "get a feel for the properties." After looking at the geology, drilling logs, and production history assembled by Pinter, he concluded that there was no way to lose.

11. Dahl was so enthusiastic about Pinter's leases that he told Grantham and the other plaintiffs, all of whom were either friends or family of Dahl, about the venture. Grantham acquired her interests because Dahl was acquiring interests in the same properties, despite the fact that Dahl had warned her of the risks inherent in the oil and gas business. All of the other plaintiffs dealt only with Dahl, not Pinter, and decided to invest because of Dahl's involvement.

12. In the spring of 1981, defendant B.J. Pinter individually and d/b/a/ Black Gold Oil Company, offered, sold and delivered an undivided fractional working interest in and to oil and gas rights in and under the Antwine 2-C well and the Doss 3-B well (and related leasehold areas) to the following plaintiffs, for the sums stated:

Purchaser	Working Interest Purchased	Name of Lease/well	Total Purchase Price
Accra Tronics Seals Corp.	1/32nd	Antwine 2-C	$7,480
Gary Clark	1/32nd	Antwine 2-C	7,480
Robert Danielle	1/32nd	Antwine 2-C	7,480
Charles Dahl	1/32nd	Antwine 2-C	7,480
Dowayne C. Bockman	1/32nd	Antwine 2-C	7,480
Ray Dilbeck	1/32nd	Antwine 2-C	7,480
Richard Koon	1/32nd	Antwine 2-C	7,480

Purchaser	Working Interest Purchased	Name of Lease/well	Total Purchase Price
Art Overgaard	1/32nd	Antwine 2-C	7,480
Jack Yeager	1/32nd	Antwine 2-C	7,480
Wendy Grantham	1/64th	Antwine 2-C	3,740
Aaron Heller	1/32nd	Doss 3-B	7,150
Wendy Grantham	1/64th	Doss 3-B	3,525

13. Defendant B.J. Pinter, individually and d/b/a/ Black Gold Oil Company, offered, sold and delivered to Dahl fractional undivided interests in and to oil and gas rights in and under the hereinafter identified wells and related leasehold areas, for the sums stated:

Antwine 1-C	5/64ths working interest	$ 18,700
Doss 3-B	7/64ths working interest	25,025
Emanuel Clark 1-B	3/8ths working interest	57,500
Walter Clark 1-C	3/8ths working interest	101,000
F.B. Watkins 1-A	3/8ths working interest	93,500
Emanuel and Walter Clark	1/16th overriding royalty	15,000

14. The U.S. mails and instrumentalities of interstate commerce were utilized in the offer, sale and delivery after sale of these fractional undivided interests.

15. The interests offered and sold to the above purchasers constituted fractional undivided interests in oil, gas and other minerals.

16. Such interests offered and sold constituted "securities" within the meaning of the Securities Act of 1933, the Securities Exchange Act of 1934, the Texas Securities Act, and the California Corporate Securities Act of 1968.

17. The fractional undivided oil and gas interests involved in this suit were never registered with the Securities and Exchange Commission.

18. The fractional undivided oil and gas interests involved in this suit were never registered with the Texas Securities Board.

19. The fractional undivided oil and gas interests involved in this suit were never registered pursuant to Section 25110 of the California Corporate Securities Law of 1968.

20. Neither Pinter nor the other defendants had any oral conversations or personal meetings with the California plaintiffs prior to their investment in the identified fractional undivided working interests. All communications and meetings before such sales and purchases were between Pinter and Dahl and/or Wendy Grantham.

21. Dahl did not receive from defendants any commission, by way of discount or otherwise, in connection with the purchase by any plaintiff of the fractional undivided oil and gas interests involved in this suit.

22. Dahl did receive a partial credit against the purchase price paid by him to Pinter d/b/a Black Gold for Dahl's purchase of interests in the Doss 3-B and Antwine 2-C wells. This credit resulted from sums owed to Dahl by Pinter and/or Black Gold.

23. Grantham did not directly receive, nor indirectly receive through Dahl, any commission from defendants in connection with the offer, sale, and delivery to the other plaintiffs of the securities involved in this suit.

24. Dahl solicited each of the other plaintiffs (save perhaps Grantham) in connection with the offer, purchase, and receipt of their oil and gas interests. Grantham apparently asked to purchase an interest after she heard of the interests from or through Dahl.

25. With respect to all plaintiffs except Dahl and Grantham, no evidence established any act or omission on the part of Pinter (or the other defendants), actionable under Section 10(b) or Rule 10b-5, which caused them any loss. With respect to Grantham, although she did deal with Pinter, the court finds that Dahl, not Pinter, was the person who caused her to purchase. Finally, with respect to Dahl himself, the court finds that he relied on his own investigation and observations, rather than on any representations by Pinter, in making his decision to purchase.

26. Moreover, the court is persuaded that Dahl would have purchased these interests even if any omitted facts of which he now complains had been disclosed to him. Given Dahl's "bell cow" role for the other plaintiffs, the court believes that their decisions would not have been any different either.

27. Plaintiffs have also failed to prove *scienter*, a necessary element to recovery under Section 10(b) and Rule 10b-5. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976). Plaintiffs offered a voluminous amount of evidence that the subject properties were so unlikely to produce oil and gas in commercial quantities that no prudent operator would ever have completed them, but the court was unconvinced that the evidence established any more than negligence on the part of defendants rather than recklessness as contended by plaintiffs.

28. Dahl did not exercise control over the business affairs or decisions of Pinter d/b/a Black Gold. Neither did Pinter d/b/a Black Gold control Dahl as to his business affairs and decisions.

29. The mineral interests involved were owned by Pinter d/b/a Black Gold. These interests were fractionated and offered to various purchasers, not limited to the plaintiffs herein.

Conclusions of Law

1. This action arises under the Securities Act of 1933, 15 U.S.C. §77a *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. §78a *et seq.* Pendent claims are asserted under the Texas Securities Act, Art. 581-1 *et seq.*, TEX. REV. CIV. STAT. (Vernon 1964), Section 27.01 of the Texas Business and Commerce Code (Vernon 1968) and Sections 25401 and 25110 of the California Corporate Securities Act of 1968.

2. The court has jurisdiction of the parties and the subject matter under 15 U.S.C. §§77v, 78aa and the doctrine of pendent jurisdiction.

3. Venue is proper in this district. 15 U.S.C. §§77v and 78aa.

4. The fractional undivided interests in oil, gas and other minerals sold by B. J. Pinter d/b/a Black Gold Oil Company constituted the offer, sale and delivery after sale of securities within the meaning of the Securities Act of 1933, the Securities Exchange Act of 1934, the Texas Securities Act, and the California Corporate Securities Act of 1968.

5. The payment for such securities made by plaintiffs to Pinter and/or Black Gold rendered the transaction a "purchase" of a security and each plaintiff a "purchaser" of a security within the meaning of Rule 10b-5 and Section 10b, Securities Exchange Act of 1934.

6. Dahl was not a "controlling person" of Pinter or Black Gold. Dahl did not have a "control relationship," by ownership, agency or otherwise, with Pinter and/or Black Gold.

7. Pinter's ownership, fractionating, offer and issuance of the oil and gas interests involved in this suit constituted Pinter and Black Gold the "issuer" of these securities.

8. Plaintiffs did not establish grounds for relief against defendants under Section 10(b) or Rule 10b-5 of the Securities Exchange Act or section 27.01 of the Texas Business and Commerce Code.

9. The so-called "private offering" exemption is an affirmative defense which must be raised and proved by the defendants. Swenson V. Engelstad, 626 F.2d 421, 425 (5th Cir. 1980). Defendants have not proved that they are entitled to the "private offering" exemption from registration afforded by the federal securities law (15 U.S.C. §77d(2) and Rule 146) or by the Texas Securities Act (Art. 581-5(I), TEX. REV. CIV. STAT. (Vernon Supp. 1984)).

10. Defendants' statute of limitations defense to the federal claim of selling unregistered securities is without merit, because the limitations period of one year began to run upon the last to occur of defendants' offer, sale, or delivery, 15 U.S.C. §77m, and some of these events did not occur more than one year prior to suit.

11. Defendants' statute of limitations defense to the claim of selling unregistered securities which is founded on the Texas Securities Act is likewise without merit, because suit was brought within three years of sale. Art. 581-33(H)(1)(a), TEX, REV. CIV. STAT. (Vernon's Supp. 1984).

12. Since the interests involved here were unregistered securities, and since the defendants have not established any exemption from the requirement that the securities be registered, plaintiffs are entitled to recover the consideration paid for their securities with interest upon proper tender of their interests to the defendants. 15 U.S.C. §77 (*l*); Art. 581-33(A), (D), TEX. REV. CIV. STAT. (Vernon's Supp. 1984).

13. In view of the court's conclusion that plaintiffs are entitled to recover on some of their claims under federal and

Texas law, the court need not decide whether California law, or other provisions of federal law (such as Section 12(2)), also afford a remedy to plaintiffs in the present circumstances.

14. The evidence did not establish that defendants are entitled to any relief on their counterclaims. As a matter of law, defendants are not "consumers" within the meaning of the Texas Deceptive Trade Practices — Consumer Protection Act, Section 17.50, TEX. BUS. & COM. CODE (Vernon Supp. 1984). Swenson v. Engelstad, above, at 428.

15. Plaintiffs are not entitled to recover attorneys' fees.

It is hereby ORDERED that, within fifteen days of this date, counsel for plaintiffs submit a proposed form of judgment consistent with the foregoing findings and conclusions.

September 21, 1984.

A. JOE FISH
A. JOE FISH
United States
District Judge

BLACK GOLD OIL COMPANY
Oil and Gas Development, Production and Operations
P.O. Box 18687 — Dallas, Texas, 75218 — (214) 328-8661

AGREEMENT

ANTWINE LEASE TRACT
WELL NO. 2C

WILCOX SAND OIL AND/OR
GAS DRILLING PROSPECT
FORTY (40) ACRES, MORE
OR LESS
OKMULGEE COUNTY, OKLAHOMA

THIS AGREEMENT is made this _____ day of _____, 1981, by and between Black Gold Oil Company of Dallas, Texas (Hereinafter referred to as "BLACK GOLD") and _____ whose address is _____ (Hereinafter referred to as "PARTICIPANT"); and whose social security number is _____.

WITNESSETH

WHEREAS the parties constitute a predetermined and limited group of sophisticated and knowledgeable well informed investors who desire to arrange for participation in an oil and/or gas drilling venture as an investment and do declare that it is not for the purpose of reselling their interest therein. (These participating interests are being sold without the benefit of registration under the Securities Act of 1933, as amended, and on reliance of rule 146 thereunder).

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS: That BLACK GOLD is the owner of one certain oil and/or gas lease tract, known as "ANTWINE LEASE", covering the following described land:

The Northeast Quarter of the Northeast Quarter (NE/4 of NE/4) of Section 10, Township 14 North, Range 11 East, being located in Okmulgee County, Oklahoma. This lease tract is subject to and there is hereby reserved an undivided one-eighth of eight-eighths (1/8th. of 8/8ths.) overriding royalty of all oil, gas and casinghead gas produced and sold from said lease tract; and, said interest is held and owned to be free and clear of all development costs and operating expenses;

this lease tract being that which BLACK GOLD proposes to drill a well to be known as ANTWINE NO. 2C in search of oil and/or gas to a depth of approximately twenty-eight hundred (2800) feet; it is understood that in the event BLACK GOLD was to attempt an OPEN HOLE completion and/or encounter oil and/or gas in estimated commercial quantities at a lesser depth, BLACK GOLD may, at its option, elect to cease drilling activities and attempt completion of said well as a commercial producer at a depth less than the said twenty-eight hundred (2800) feet which penetrates the Wilcox Sand.

PARTICIPANT states that he and/or she desires to join BLACK GOLD in the drilling of the said well and a portion ownership interest in same upon the terms and conditions hereinafter described:

NOW THEREFORE, and in consideration of the sum of _____ _____ ( ) DOLLARS paid in hand by PARTICIPANT to BLACK GOLD, BLACK GOLD hereby covenants and agrees to sell, transfer and assign to PARTICIPANT a well site lease tract set out by the field rules and regulations and/or the General Rules and Regulations of the Oil and Gas Conservation Division of the Corporation Commission of the State of Oklahoma, whichever takes precedence in the area of the lease tract as to well spacing; and PARTICIPANT agrees to accept a

_____ ( ) of 0.750000 working interest (Decimal working interest represents 100 per cent of the working interest after allowance has been made for the amounts of Royalty and Overriding Royalty being deducted and said Royalty and Overriding Royalty interests are to be free and clear of all development costs and operating expenses; but shall pay proportionate amounts of state oil and/or gas taxes).

PARTICIPANT'S amount of assigned working interest from BLACK GOLD after the well is completed to a stable production status, the following terms and conditions shall be abided to as mutually agreed between the parties of this AGREEMENT:

1. BLACK GOLD shall pay for all of the lease acquisition and shall have the necessary legal work performed to assure good and valid title of the lease tract clearing the right to drill for, produce and sell any oil and/or gas produced from the said lease tract; shall have the necessary engineering and survey work completed to stake the well's location; shall file the necessary survey plat and other forms containing information to obtain a drilling permit; shall cause to be drilled a well to approximately twenty-eight hundred (2800) feet; and in the event the well should appear to be non-commercial prior to pipe being set, BLACK GOLD shall cause said well to be plugged and abandoned in compliance with the Rules and Regulations of the Oklahoma Corporation Commission without any additional costs to the PARTICIPANT. However, if the Lithology of the drilled cutting samples and the Induction Electric Log together with the Compensated Density Log by interpretation indicate to BLACK GOLD'S personnel and or its representatives that the well appears to be capable of being productive of oil and/or gas in commercial quantities; PARTICIPANT

agrees and endorses BLACK GOLD to commence to attempt completion of the said well to a production status if possible by present completion methods and equip same to produce oil into the storage tank battery and/or gas into the flow line.

PARTICIPANT shall pay in hand to BLACK GOLD a sum of _____ _____ ( ) DOLLARS additionally for Completion and Equipping Costs and the PARTICIPANT agrees to pay said sum to BLACK GOLD within five (5) calendar days from receipt of such verbal notice from BLACK GOLD that an attempted completion is planned to be made on the well.

The assignment of working interest from BLACK GOLD to and in favor of the PARTICIPANT shall be subject to all of the terms, conditions and provisions of the Oil and Gas Lease acquired by BLACK GOLD from the LESSOR and/or LESSORS on the lease tract hereinbefore described. It is understood that the PARTICIPANT will be required to execute a Division Order that is to be provided by the Purchaser of the oil and/or a Gas Contract in the event gas production is obtained, produced and sold from the completed well located on the said lease tract.

It is understood and agreed to that the PARTICIPANT shall be a co-owner as a tenant in common with BLACK GOLD and others in the said leasehold estate hereinbefore described and shall not be a partner and shall elect to be excluded from the application of Subchapter K, Chapter 1, Subtitle A, of the Internal Revenue Code, as now or hereinafter amended.

In the event the well was to be completed to a production status, PARTICIPANT agrees to sign an Operating Agreement to be provided by BLACK GOLD prior to receiving the assignment of working interest; and BLACK GOLD shall be and remain to be the Operator of the well drilled upon the lease tract; and PARTICIPANT agrees to pay his and/or her pro-

rata share of the costs of operating, properly maintaining and protecting the said well, equipment and leasehold estate. Such operating costs shall be billed monthly or quarterly as BLACK GOLD should elect to do as its choice, and PARTICIPANT agrees to pay same within ten (10) calendar days after receipt of said billing.

BLACK GOLD shall at all times keep such leasehold estate free and clear of all labor, material, mechanic and other liens and encumbrances arising from conducting operations upon the lease tract. BLACK GOLD as Operator shall have a Lien of Privilege on any working interest owner's proceeds from any produced and sold products from the said lease tract upon written notification to the Purchaser of said products in the event the PARTICIPANT refused to pay his and/or her prorata of billed operating costs creating an unnecessary burden to the other PARTICIPANTS and the Operator.

It is further understood that BLACK GOLD is to drill and attempt the completion on a TURNKEY PRICE basis to the PARTICIPANT within the amounts hereinbefore stipulated. In any case and under any circumstances will the PARTICIPANT be assessed any additional costs for the drilling of the said well to the casing point, other than the sum set out hereinbefore, which the PARTICIPANT has agreed to pay for his portion of working interest in the leasehold estate. The only exception to this provision extended to the PARTICIPANT would be as a direct result of "FORCE MAJEURE" which is beyond anyone's control. If this event should ever occur, BLACK GOLD would be required to immediately notify the PARTICIPANT of what has happened and the estimated cost and impact to the well's status as a result of the event and the related damage.

WITNESS THE EXECUTION HEREIN ON THE DATE SET OUT HEREINBEFORE:

BLACK GOLD OIL COMPANY

/s/ B. J. PINTER
By: B. J. Pinter

/s/
By: Participant

Please make all checks payable to BLACK GOLD OIL COMPANY, stub check information as ANTWINE NO. 2C WELL, LOCATED IN SECTION 10, T14N, R11E, IN OKMULGEE COUNTY, OKLAHOMA and make the additional notation of "Drilling and Logging" or "Completion and Equipping".

COST SCHEDULE

Working Interest Amount	Drilling and Logging	Completing and Equipping
1/16th. of 0.750000	$ 7,680.00	$ 7,280.00
1/8th. of 0.750000	15,360.00	14,560.00
3/16ths. of 0.750000	23,040.00	21,840.00

XIV

DEFENSES

First Defense

1. *Illegality.* The Defendants are not liable to the Plantiffs under the various causes of action set forth in PFAC because the Defendants were induced to engage in the conduct therein alleged by the Fraudulent conduct of the Plaintiff, M. Dahl, all as set forth in Defendants' Counter-Claim herein below, which is incorporated by reference herein. [p. 40, Answer of Defendants].

Second Defense

2. *Estoppel.* The Plaintiffs are legally and equitably estopped from seeking to enforce the causes of action alleged in PFAC because the securities they received were sold, and their delivery effectuated, by fraudulent misrepresentations, concealment and willful nondisclosure on the part of the Plaintiff, M. Dahl, all as more particularly set forth in Defendants' Counter-Claim herein below, which is incorporated by reference herein. [p. 40, Answer of Defendants].

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Fifth Defense

5. *In Pari Delicto.* The Plaintiff, M. Dahl, engaged in fraudulent misrepresentations to Pinter and the other Plaintiffs, all as set forth in the Defendants' Counter-Claim. He is therefore barred from recovery for the causes of action set forth PFAC, by reason of his conduct *in pari delicto* in connection with the offer, sale and delivery of the securities of that which he complains. [p. 41, Answer of Defendants].

Sixth Defense

6. *Plaintiff Acting as Principal.* The Plaintiff, M. Dahl, is barred from recovery for the causes of action asserted in PFAC, by reason of his conduct as a principal in connection with the offer, sale and delivery of the securities about which he complains. [p. 41, Answer of Defendants].

• • •

Ninth Defense

9. *Aiding and Abetting.* The right of the Plaintiff, M. Dahl, to recover under the various causes of action set forth in PFAC, which are elsewhere vigorously denied, is barred, by reason of his knowing and affirmative aiding and abetting of any violation which did occur. [p. 42, Answer of Defendants].

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Thirteenth Defense

13. *Waiver.* The Plaintiff, M. Dahl, is barred from recovery for the various causes of action asserted in PFAC by reason of his conduct inconsistent with such demands, under the doctrine of waiver, all as set forth herein more fully in Defendants' Counter-Claim, which is incorporated herein by reference. [p. 43, Answer of Defendants].

Fourteenth Defense

14. *Controlling Person.* The Plaintiff, M. Dahl, is barred from recovery herein by reason of his conduct as a "controlling person" with regard to the offer, sale, issuance and delivery of securities complained of herein, all is more particulary set forth in 15 U.S.C.A. §78t (1981). [p. 43, Answer of Defendants].

• • •

DEFENDANTS' COUNTERCLAIM

• • •

COUNT ONE

(*Commonlaw fraud* — affirmative misrepresentations inducing Defendants to transfer securities to M. Dahl and the remaining Plaintiffs.)

1. At all times herein, the Plaintiff, M. Dahl, held himself out to be an experienced oil and gas investor, driller and operator doing business in Texas, Pennsylvania and elsewhere as "Puma Petroleum," a purported Texas Corporation, and "Wrangler Oil Company," a purported "offshore corporation." At all material times, Puma Petroleum (hereinafter, "Puma"), and Wrangler Oil Company (hereinafter, "Wrangler"), were the alter egos of M. Dahl, being merely sham corporations or entities with no separate identity from M. Dahl. At all material times, M. Dahl was president, manager, owner, sole board

member and chief executive officer of Puma, his purported corporation. Prior to entering into a joint business venture with Pinter, the Plaintiff, M. Dahl, specifically held himself out to Pinter as an experienced oil and gas operator and investor who had a number of friends and business associates who were knowledgeable and sophisticated investors in oil and gas leasing, drilling and operating ventures and who were eager to invest substantial monies for that purpose with M. Dahl. Prior to the actions complained of by the Plaintiffs herein, the Plaintiff, M. Dahl, sought and obtained Pinter's advice on oil drilling, operational problems and the purchase of oil and gas production, which advice was provided to Dahl by Pinter upon request and without charge. At all material times, it was the Plaintiff, M. Dahl, rather than the Defendant, B. J. Pinter, who eagerly sought the opportunity to bring the two together for drilling and production purposes. Furthermore, at all material times it was the Plaintiff, M. Dahl, rather than the Defendant, B. J. Pinter, who initiated various discussions of joint ventures, purchase of leases, drilling, and solicitation of outside investors for the purpose of raising drilling capital.

• • •

4. As to the other Plaintiffs, the Plaintiff, M. Dahl, initially at a meeting at Northpark Tower or Denny's Restaurant in Dallas, Texas and on numerous occasions thereafter, informed Pinter that he had a number of friends and business associates who were sophisticated investors in the oil and gas business and who were also extremely eager to invest money with M. Dahl in any prospect which he would endorse. As M. Dahl's insistance, Pinter agreed to operate the funding of the Clark, Watkins, Doss and Antwine leases on a joint venture basis, with M. Dahl being granted a right to sell interests in such ventures to a small number of his knowledgeable friends and business associates. He was allowed to do so by Pinter because of the following fraudulent misrepresentations of material fact, acts of con-

cealment and non-disclosure, and fraudulent course of deceptive and unconscionable conduct.

5. *Affirmative Misrepresentations.* On or about November 15, 1980, at the Denny's Restaurant at the corner of Jim Miller and Hwy. I-30 or in the Puma Petroleum office located at the Northpark tower, both of which locations are situated in Dallas County, Texas, the Plaintiff and Counter-Defendant, M. Dahl, made the following affirmative misrepresentations of material fact, in order to induce the Defendant the Counter-Plaintiff, B. J. Pinter, to allow M. Dahl to raise a portion of the capital needed in order to drill the Watkins, Clark, Doss and Antwine leasehold prospect:

(a) That he was an experienced oil man, operating two separate oil companies, Puma Petroleum, and Wrangler Oil.

(b) That Wrangler was an "offshore corporation" and that M. Dahl wished to channel various expenses and profits through each of his two business entities depending on tax considerations.

(c) That M. Dahl had a number of sophisticated and knowledgeable oil and gas investors friends and business associates who were eager to invest substantial amounts of money through Dahl.

(d) That these investors had sufficient expertise to independently evaluate any drilling and leasehold prospects, and that Dahl would provide them with the facts upon which to make such an analysis.

(e) That M. Dahl would keep additional investors up to date with reports of business activities from the field. In other words, it was the working understanding between M. Dahl and Pinter that Pinter was only an "operator," i.e., the man who was doing the drilling, testing, completion, leasing, geological research and the like, and that M. Dahl

would raise the money, i.e., would undertake the affirmative actions necessary to find a few sophisticated investors, to represent the true facts concerning the prospects and the risks involved therewith, to maintain satisfactory communications and to inform the investors of the status of the various wells, including drilling progress, completion progress, expenses and the like.

(f) That M. Dahl would continue to supply the investors with the information he received from Pinter in good faith.

6. Each of the above misrepresentations was false. The Plaintiff, M. Dahl, made such misrepresentations with knowledge of the true facts, with knowledge that Pinter did not know the true facts, and with the intention that such misrepresentations be relied upon by Pinter. Pinter did in fact rely upon them, and was induced to act to his financial detriment thereby. Based upon these false assertions of fact by M. Dahl, Pinter was induced to offer, sell and transfer the securities complained of by Dahl, to enter into purported joint venture with Puma Petroleum, to allow M. Dahl to offer, sell and deliver securities to the other Plaintiffs, to receive the funds issued by all Plaintiffs, and to pay the Plaintiff and Counter-Defendant, M. Dahl, approximately $38,000.00 in sales commissions as a result of the transfer of such securities. As a proximate result, the Defendants and Counter-Plaintiffs have been damaged in the amount of One Million Dollars, including the loss of payments due from the Plaintiffs under their responsibility to issue same as working interest holders, the loss of revenue from sale of oil and gas which could otherwise have been obtained, the harm suffered to Pinter's credit rating, business and financial reputation, leverage in borrowing capacity, ability to make use of discounts for materials used in the oil and gas drilling business, loss of time, loss of money and the use of money, physical discomfort, inconvenience and mental anguish.

7. The Plaintiff and Counter-Defendant, M. Dahl, acted willfully and maliciously in making the above referenced misrepresentations of fact and engaging in the above referenced fraudulent plan, scheme and course of conduct. In fact, the Plaintiff and Counter-Defendant, M. Dahl, entered into each of the joint ventures engaged in with the Defendant and Counter-Plaintiff, B. J. Pinter, knowing that a substantial risk of non-profit or delayed profits existed, as it always exists in the drilling business. In fact, the Plaintiff and Counter-Defendant, M. Dahl, entered into these joint ventures, and engaged in the above referenced fraudulent conduct, knowing that should the wells not "pay out" in accordance with his hopes, and at a rapid rate, he would simply turn around and allege misrepresentations under the Securities Act, as he has in fact done. Accordingly, Pinter is entitled to recover exemplary damages against the Plaintiff, M. Dahl, in the amount of at least Five Million Dollars.

COUNT TWO

(Commonlaw fraud — concealment and willful non-disclosure of facts known to M. Dahl and inducing Pinter to engage in joint venture and sale of securities.)

8. The Defendants re-allege Paragraphs 1-7.

9. After learning that the wells would not pay out as rapidly as he had hoped, and in furtherance of his fraudulent plan, scheme and course of conduct, M. Dahl willfully concealed and further failed to disclose material facts of which he knew Pinter to be unaware. M. Dahl fraudulently concealed and failed to disclose:

(a) His plan to "turn turkey" and file a lawsuit in the event that the oil properties did not pay out in accordance with his unreasonable expectations;

(b) His fraudulent misrepresentations concerning the likelihood of recovery of oil and gas to the other Plaintiffs.

10. In furtherance of his fraudulent plan, scheme and course of conduct, M. Dahl made misrepresentations of material fact to the other Plaintiffs, including, but not limited to, each of the misrepresentations of material fact set out in PFAC, Paragraphs IV (19, 35, 37 and 38).

11. As a proximate result of such fraudulent concealment and acts of non-disclosure, the Defendants have been damaged in the amount of one million dollars, and are entitled to recover five million dollars in punitive damages.

[¶ 57188] Reg. § 230.146 (Rule 146) Transactions by an Issuer Deemed Not to Involve Any Public Offering

⟹ Rule 146 has been rescinded in Release No. 33-6389 (¶ 83,106), effective June 30, 1982. Reproduced below is the text of Rule 146 as in effect prior to rescission.

Reg. § 230.146. *Preliminary Notes*

1. The Commission recognizes that no one rule can adequately cover all legitimate private offers and sales of securities. Transactions by an issuer which do not satisfy all of the conditions of this rule shall not raise any presumption that the exemption provided by Section 4(2) of the Act is not available for such transactions. Issuers wanting to rely on that exemption may do so by complying with administrative and judicial interpretations in effect at the time of the transactions. Attempted compliance with this rule does not act as an election; the issuer can also claim the availability of Section 4(2) outside the rule.

2. Nothing in this rule obviates the need for compliance with any applicable state law relating to the offer and sale of securities.

3. Section 5 of the Act requires that all securities offered by the use of mails or other channels of interstate commerce be registered with the Commission. Congress, however, provided certain exemptions in the Act from such registration provisions where there was no practical need for registration or where the public benefits of registration were too remote. Among these exemptions is that provided by Section 4(2) of the Act for transactions by an issuer not involving any public offering. The courts and the Commission have interpreted the Section 4(2) exemption to be available for offerings to

persons who have access to the same kind of information that registration would provide and who are able to fend for themselves. The indefiniteness of such terms as "public offering", "access" and "fend for themselves" has led to uncertainties with respect to the availability of the Section 4(2) exemption. Rule 146 is designed to provide, to the extent feasible, objective standards upon which responsible businessmen may rely in raising capital under claim of the Section 4(2) exemption and also to deter reliance on that exemption for offerings of securities to persons who need the protections afforded by the registration process.

In order to obtain the protection of the rule, all its conditions must be satisfied and the issuer claiming the availability of the rule has the burden of establishing, in an appropriate forum, that it has satisfied them. The burden of proof applies with respect to each offeree as well as each purchaser. *See "Lively v. Hirschfeld,"* 440 F. 2d 631 (10th Cir. 1971). Broadly speaking, the conditions of the rule relate to limitations on the manner of the offering, the nature of the offerees, access to or furnishing of information, the number of purchasers, and limitations on disposition.

The term "offering" is not defined in the rule. The determination as to whether offers, offers to sell, offers for sale, or sales of securities are part of an offering (i.e., are deemed to be "integrated") depends on the particular facts and circumstances. *See* Securities Act Release No. 4552 (November 6, 1962) [¶ 2770]. All offers, offers to sell, offers for sale or sales which are part of an offering must meet all of the conditions of Rule 146 for the rule to be available. Release 33-4552 indicates that in determining whether offers and sales should be regarded as a part of a larger offering and thus should be integrated, the following factors should be considered:

Caution: Rule 146 is rescinded.

(a) Whether the offerings are part of a single plan of financing;

(b) Whether the offerings involve issuance of the same class of security;

(c) Whether the offerings are made at or about the same time;

(d) Whether the same type of consideration is to be received; and

(e) Whether the offerings are made for the same general purpose.

4. Rule 146 relates to transactions exempted from Section 5 by Section 4(2) of the Act. It does not provide an exemption from the anti-fraud provisions of the securities laws or the civil liability provisions of Section 12(2) of the Act or other provisions of the securities laws, including the Investment Company Act of 1940.

5. Clients of an investment adviser, customers of a broker or dealer, trusts administered by a bank trust department or persons with similar relationships shall be considered to be the "offerees" or "purchasers" for purposes of the rule regardless of the amount of discretion given to the investment adviser, broker or dealer, bank trust department or other person to act on behalf of the client, customer or trust.

6. The rule is available only to the issuer of the securities and is not available to affiliates or other persons for sales of the issuer's securities.

7. Finally, in view of the objectives of the rule and the purposes and policies underlying the Act, the rule is not available to any issuer with respect to any transactions which, although in technical compliance with the rule, are part of a plan or scheme to evade the registration provisions of the Act. In such cases registration pursuant to the Act is required.

[Text of Rule]

(a) *Definitions.* The following definitions shall apply for purposes of this rule.

(1) *Offeree Representative.* The term "offeree representative" shall mean any person or persons, each of whom the issuer and any person acting on its behalf, after making reasonable inquiry, have reasonable grounds to believe and believe satisfies all of the following conditions:

(i) Is not an affiliate, director, officer or other employee of the issuer, or beneficial owner of 10 percent or more of any class of the equity securities or 10 percent or more of the equity interest in the issuer, except where the offeree is:

(*a*) Related to such person by blood, marriage or adoption, no more remotely than as first cousin;

(*b*) Any trust or estate in which such person or any persons related to him as specified in paragraph (a)(1)(i)(*a*) or (*c*) of this section collectively have 100 percent of the beneficial interest (excluding contingent interests) or of which any such person serves as trustee, executor, or in any similar capacity; or

(*c*) Any corporation or other organization in which such person or any persons related to him as specified in paragraph (a)(1)(i)(*a*) or (*b*) of

[¶ 5718B] Reg. § 230.146 (Rule 146)—Continued

this section collectively are the beneficial owners of 100 percent of the equity securities (excluding directors' qualifying shares) or equity interests;

(ii) Has such knowledge and experience in financial and business matters that he, either alone, or together with other offeree representatives or the offeree, is capable of evaluating the merits and risks of the prospective investment;

(iii) Is acknowledged by the offeree, in writing, during the course of the transaction, to be his offeree representative in connection with evaluating the merits and risks of the prospective investment; and

(iv) Discloses to the offeree, in writing, prior to the acknowledgement specified in paragraph (a)(1)(iii) of this section, any material relationship between such person or its affiliates and the issuer or its affiliates, which then exist or is mutually understood to be contemplated or which has existed at any time during the previous two years, and any compensation received or to be received as a result of such relationship.

NOTE 1: Persons acting as offeree representatives should consider the applicability of the registration and anti-fraud provisions relating to brokers and dealers under the Securities Exchange Act of 1934 and relating to investment advisers under the Investment Advisers Act of 1940.

NOTE 2: The acknowledgement required by paragraph (a)(1)(iii) of this section and the disclosure required by paragraph (a)(1)(iv) of this section must be made with specific reference to each prospective investment. Advance blanket acknowledgement, such as for "all securities transactions" or "all private placements", is not sufficient.

NOTE 3: Disclosure of any material relationships between the offeree representative or its affiliates and the issuer or its affiliates does not relieve the offeree representative of its obligation to act in the interest of the offeree.

(2) *Issuer*. The definition of the term "issuer" in Section 2(4) of the Act shall apply, provided that notwithstanding that definition, in the case of a proceeding under the Bankruptcy Act, the trustee, receiver, or debtor in possession shall be deemed to be the issuer in an offering for purposes of a plan of reorganization or arrangement, if the securities offered are to be issued pursuant to the plan, whether or not other like securities are offered under the plan in exchange for securities of, or claims against, the debtor.

(3) *Affiliate*. The term "affiliate" of a person means a person that directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with such person.

(4) *Material*. The term "material" when used to modify "relationship" means any relationship that a reasonable investor might consider important in the making of the decision whether to acknowledge a person as his offeree representative.

(b) *Conditions to be Met*. Transactions by an issuer involving the offer, offer to sell, offer for sale or sale of securities of the issuer that are part of an offering that is made in accordance with all the conditions of this rule shall be deemed to be transactions not involving any public offering within the meaning of Section 4(2) of the Act.

(1) For purposes of this rule only, an offering shall be deemed not to include offers, offers to sell, offers for sale or sales of securities of the issuer

pursuant to the exemptions provided by Section 3 or Section 4(2) of the Act or pursuant to a registration statement filed under the Act, that take place prior to the six-month period immediately preceding or after the six-month period immediately following any offers, offers for sale or sales pursuant to this rule, *Provided*, That there are during neither of said six-month periods any offers, offers for sale or sales of securities by or for the issuer of the same or similar class as those offered, offered for sale or sold pursuant to the rule.

NOTE: In the event that securities of the same or similar class as those offered pursuant to the rule are offered, offered for sale or sold less than six months prior to or subsequent to any offer, offer for sale or sale pursuant to the rule, *see* Preliminary Note 3 hereof as to which offers, offers to sell, offers for sale or sales may be deemed to be part of the offering.

(2) Transactions by an issuer which do not satisfy all of the conditions of this rule shall not raise any presumption that the exemption provided by Section 4(2) of the Act is not available for such transactions. [Amended in Release No. 33-5975 (¶ 81,708), September 8, 1978, 43 F. R. 41194.]

(c) *Limitation on Manner of Offering*. Neither the issuer nor any person acting on its behalf shall offer, offer to sell, offer for sale, or sell the securities by means of any form of general solicitation or general advertising, including but not limited to, the following:

(1) Any advertisement, article, notice or other communication published in any newspaper, magazine or similar medium or broadcast over television or radio;

(2) Any seminar or meeting, *except* that if paragraph (d)(1) of this section is satisfied as to each person invited to or attending such seminar or meeting, and, as to persons qualifying only under paragraph (d)(1)(ii) of this section, such persons are accompanied by their offeree representative(s), then such seminar or meeting shall be deemed not to be a form of general solicitation or general advertising; and

(3) Any letter, circular, notice or other written communication, *except* that if paragraph (d)(1) of this section is satisfied as to each person to whom the communication is directed, such communication shall be deemed not to be a form of general solicitation or general advertising.

(d) *Nature of offerees*. The issuer and any person acting on its behalf who offer, offer to sell, offer for sale or sell the securities shall have reasonable grounds to believe and shall believe:

(1) Immediately prior to making any offer, either:

(i) That the offeree has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or

(ii) That the offeree is a person who is able to bear the economic risk of the investment; and

(2) Immediately prior to making any sale, after making reasonable inquiry, either:

(i) That the offeree has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or

⟹ *Caution: Rule 146 is rescinded.*

[¶ 5718B] Reg. § 230.146 (Rule 146)—Continued

(ii) That the offeree and his offeree representative(s) together have such knowledge and experience in financial and business matters that they are capable of evaluating the merits and risks of the prospective investment and that the offeree is able to bear the economic risk of the investment.

(e) *Access to or Furnishing of Information.*

NOTE: Access can only exist by reason of the offeree's position with respect to the issuer. Position means an employment or family relationship or economic bargaining power that enables the offeree to obtain information from the issuer in order to evaluate the merits and risks of the prospective investment.

(1) Either

(i) Each offeree shall have access during the course of the transaction and prior to the sale to the same kind of information that is specified in Schedule A of the Act, to the extent that the issuer possesses such information or can acquire it without unreasonable effort or expense; or

(ii) Each offeree or his offeree representative(s), or both, shall have been furnished during the course of the transaction and prior to sale, by the issuer or any person acting on its behalf, the same kind of information that is specified in Schedule A of the Act, to the extent that the issuer possesses such information or can acquire it without unreasonable effort or expense. This condition shall be deemed to be satisfied as to an offeree if the offeree or his offeree representative is furnished with information, either in the form of documents actually filed with the Commission or otherwise, as follows:

(*a*) In the case of an issuer that is subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934:

(*1*) The information contained in the annual report required to be filed under the Exchange Act or a registration statement on Form S-1 under the Act or on Form 10 under the Exchange Act, whichever filing is the most recent required to be filed, and the information contained in any definitive proxy statement required to be filed pursuant to section 14 of the Exchange Act and in any reports or documents required to be filed by the issuer pursuant to section 13(a) or 15(d) of the Exchange Act, since the filing of such annual report or registration statement, and

(*2*) A brief description of the securities being offered, the use of the proceeds from the offering, and any material changes in the issuer's affairs which are not disclosed in the documents furnished;

(*b*) In the case of all other issuers, the information that would be required to be included in a registration statement filed under the Act on the form which the issuer would be entitled to use, provided, however, that:

A. the issuer may omit details or employ condensation of information if, under the circumstances, the omitted information is not material or the condensation of information does not render the statements made misleading.

NOTE: The issuer would have the burden of proof to show that, under the circumstances, the omitted information is not material and that any condensation does not render the statements made misleading.

B. if the issuer does not have the audited financial statements required by such form and cannot obtain them without unreasonable effort or expense, such financial statements may be furnished on an unaudited basis, provided that if such unaudited financial statements are not available and cannot be

⟹ *Caution: Rule 146 is rescinded.*

obtained without unreasonable effort or expense, the financial statements required by Regulation A under the Act may be furnished.

C. if the financial schedules required by Part II of the registration statement have not been prepared, they need not be furnished.

(*c*) Notwithstanding paragraph (e)(1)(ii)(*a*) and (*b*) of this section exhibits required to be filed with the Commission as part of a registration statement or report need not be furnished to each offeree or offeree representative if the contents of the exhibits are identified and such exhibits are available pursuant to paragraph (e)(*2*) of this section: [Amended in Release No. 33-5975 (¶ 81,708), September 8, 1978, 43 F. R. 41194.]

(*d*) If the aggregate sales price of all securities offered in reliance upon this rule does not exceed $1,500,000, the information requirements of paragraph (e)(1)(ii) may be satisfied by furnishing the disclosure required by schedule I of Regulation A under Section 3(b) of the Act; and [Amended in Release No. 33-5975 (¶ 81,708), September 8, 1978, 43 F. R. 41194.]

(2) The issuer shall make available, during the course of the transaction and prior to sale, to each offeree or his offeree representative(s) or both, the opportunity to ask questions of, and receive answers from, the issuer or any person acting on its behalf concerning the terms and conditions of the offering and to obtain any additional information, to the extent the issuer possesses such information or can acquire it without unreasonable effort or expense, necessary to verify the accuracy of the information obtained pursuant to paragraph (e)(1) of this section; and

(3) The issuer or any person acting on its behalf shall disclose to each offeree, in writing, prior to sale:

(i) Any material relationship between his offeree representative(s) or its affiliates and the issuer or its affiliates, which then exists or mutually is understood to be contemplated or which has existed at any time during the previous two years, and any compensation received or to be received as a result of such relationship;

(ii) That a purchaser of the securities must bear the economic risk of the investment for an indefinite period of time because the securities have not been registered under the Act and, therefore, cannot be sold unless they are subsequently registered under the Act or an exemption from such registration is available; and

(iii) The limitations on disposition of the securities set forth in paragraph (h)(2), (3), and (4) of this section.

NOTE: Information need not be provided and opportunity to obtain additional information need not be continued to be provided to any offeree or offeree representative who, during the course of the transaction, indicates that he is not interested in purchasing the securities offered, or to whom the issuer or any person acting on its behalf has determined not to sell the securities.

[Amended in Release No. 33-5385 (¶ 80,168), effective May 19, 1975, 40 F. R. 21709.]

(f) *Business Combinations.*

(1) The term "business combination" shall mean any transaction of the type specified in paragraph (a) of Rule 145 under the Act and any transaction involving the acquisition by one issuer, in exchange solely for all or a part of its own or its parent's voting stock, of stock of another issuer if, immediately after the acquisition, the acquiring issuer has control of the other issuer (whether or not it had control before the acquisition).

[¶ 5718B] Reg. § 230.146 (Rule 146)—Continued

(2) All the conditions of this rule except paragraph (d) and paragraph (h)(4) of this section shall apply to business combinations.

NOTE: Notwithstanding the absence of a written agreement pursuant to paragraph (h)(4), any securities acquired in an offering pursuant to paragraph (f) are restricted and may not be resold without registration under the Act or an exemption therefrom.

(3) For purposes of paragraph (f) only, the issuer and any person acting on its behalf, after making reasonable inquiry, shall have reasonable grounds to believe, and shall believe, at the time that any plan for a business combination is submitted to security holders for their approval, or in the case of an exchange, immediately prior to the sale, that each offeree either alone or with his offeree representative(s) has such knowledge and experience in financial and business matters that he is or they are capable of evaluating the merits and risks of the prospective investment.

(4) In addition to information required by paragraphs (e) and (f)(2), the issuer shall provide, in writing, to each offeree at the time the plan is submitted to security holders, or in the case of an exchange, during the course of the transaction and prior to the sale, information about any terms or arrangements of the proposed transaction relating to any security holder that are not identical to those relating to all other security holders.

[Amended in Release No. 33-5884, ¶ 80,108, effective May 19, 1975, 40 F. R. 21709.]

(g) *Number of Purchasers.*

(1) The issuer shall have reasonable grounds to believe, and after making reasonable inquiry, shall believe, that there are no more than thirty-five purchasers of the securities of the issuer from the issuer in any offering pursuant to the rule.

NOTE: See paragraph (b)(1) of this section, the note thereto and the Preliminary Notes as to what may or may not constitute an offering pursuant to the rule.

(2) For purposes of computing the number of purchasers for paragraph (g)(1) of this section only:

(i) The following purchasers shall be excluded:

(*a*) Any relative or spouse of a purchaser and any relative of such spouse, who has the same home as such purchaser; and

(*b*) Any trust or estate in which a purchaser or any of the persons related to him as specified in paragraph (g)(2)(i)(*a*) or (*c*) of this section collectively have 100 percent of the beneficial interest (excluding contingent interests);

(*c*) Any corporation or other organization of which a purchaser or any of the persons related to him as specified in subdivision (g)(2)(i)(*a*) or (*b*) collectively are the beneficial owners of all the equity securities (excluding directors' qualifying shares) or equity interest; and

(*d*) Any person who purchases or agrees in writing to purchase for cash in a single payment or installments, securities of the issuer in the aggregate amount of $150,000 or more.

NOTE: The issuer has to satisfy all the other provisions of the rule with respect to all purchases whether or not they are included in computing the number of purchasers under Subdivision (g)(2)(i).

(ii) There shall be counted as one purchaser any corporation, partnership, association, joint stock company, trust or unincorporated organization, *except* that if such entity was organized for the specific purpose of acquiring the securities offered, each beneficial owner of equity interests or equity securities in such entity shall count as a separate purchaser.

NOTE: *See* Preliminary Note 5 as to other persons who are considered to be purchasers.

(h) *Limitations on Disposition.* The issuer and any person acting on its behalf shall exercise reasonable care to assure that the purchasers of the securities in the offering are not underwriters within the meaning of section 2(11) of the Act. Such reasonable care shall include, but not necessarily be limited to, the following:

(1) Making reasonable inquiry to determine if the purchaser is acquiring the securities for his own account or on behalf of other persons;

(2) Placing a legend on the certificate or other document evidencing the securities stating that the securities have not been registered under the Act and setting forth or referring to the restrictions on transferability and sale of the securities;

(3) Issuing stop transfer instructions to the issuer's transfer agent, if any, with respect to the securities, or, if the issuer transfers its own securities, making a notation in the appropriate records of the issuer; and

(4) Obtaining from the purchaser a signed written agreement that the securities will not be sold without registration under the Act or exemption therefrom.

NOTE: Paragraph (h)(4) of this section does not apply to business combinations as described in paragraph (f) of this section. Notwithstanding the absence of a written agreement, the securities are restricted and may not be resolved without registration under the Act or an exemption therefrom. The issuer for its own protection should consider, however, obtaining such written agreement even in business combinations.

(i) *Report of offering.* At the time of the first sale of securities in any offering effected in reliance on this rule the issuer shall file three copies of a report on Form 146 with the Commission at the Commission's Regional Office for the region in which the issuer's principal business operations are conducted or proposed to be conducted in the United States. The copies of such report with respect to an issuer having or proposing to have its principal business operations outside the United States shall be filed with the Regional Office for the region in which the offering is primarily conducted or proposed to be conducted. No report need be filed for any offering or offerings in reliance on Rule 146 the proceeds of which total, cumulatively, less than $50,000 during any twelve-month period. If any material change occurs in the facts set forth on the report on Form 146 filed with the Commission, the person who filed the statement shall promptly file with the Commission, at the Regional Office of the Commission in which the original report on Form 146 was filed, three copies of an amended Form 146 disclosing such change. [Adopted in Release No. 33-5912 (¶ 81,524), effective May 3, 1978, 43 F. R. 10550.]

[Adopted in Release No. 33-5487 (¶ 2710), effective June 10, 1974, 39 F. R. 15261, amended in Release No. 33-5912 (¶ 81,524), effective May 3, 1978, 43 F. R. 10550, Release No. 33-5975 (¶ 81,708), September 8, 1978, 43 F. R. 41194; rescinded in Release No. 33-6389 (¶ 83,106), effective June 30, 1982, 47 F. R. 11251.

[Compilation reference: ¶ 2709.]

REPLY BRIEF

No. 86-805

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BILLY J. "B.J." PINTER, *et al.*, *Petitioners*

v.

MAURICE DAHL, *et al.*, *Respondents*

PETITIONERS' REPLY MEMORANDUM

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Counsel for Petitioners

March 20, 1987

No. 86-805

IN THE SUPREME COURT OF THE UNITED STATES

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BILLY J. "B.J." PINTER, et al., *Petitioners*

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PETITIONERS' REPLY MEMORANDUM

In his opposing brief, respondent contends that the petitioner "did not raise" at trial, and that the Fifth Circuit Court of Appeals "did not consider," the distinction between an *in pari delicto* defense on the basis of fraud and one on the basis of non-fraudulent conduct, *e.g.*, sale of an unregistered security in violation of §12(1). This assertion is demonstrably incorrect. Petitioner's trial pleadings contained the following affirmative defense:

> 3. *Contributory Fault.* The plaintiffs[']' right to recover under the causes of action set forth in [Plaintiffs' First Amended Complaint] are barred by the doctrine of contributory fault.

Respondent's brief to the Fifth Circuit contended in similar fashion that the "equal fault seller" defense was "never raised as a defensive issue or as a counter-claim in the proceedings below." Brief of appellees Maurice Dahl, *et al.*, before the U.S. Circuit Court of Appeals for the Fifth Circuit, at p. 16. By letter dated September 10, 1985, the Fifth Circuit directed the

petitioner to address this argument. By letter dated September 19, 1985, the petitioner detailed trial pleadings and transcript excerpts raising the defense. The Fifth Circuit subsequently addressed the issue as fully raised.

In light of respondent's inability or refusal to face issues clearly presented in the petition without grossly distorting the *Eichler* decision, *B. Eichler, H. Richards, Inc. v. Berner,* 472 U. S. ____, 86 L.Ed.2d 215, 105 S.Ct. 2622 (1985), petitioner suggests that summary reversal is in order.

Respectfully submitted,

/s/ BRADEN W. SPARKS

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CERTIFICATE OF SERVICE

I, Braden W. Sparks, a member of the Bar of this Court, hereby certify that on this 20th day of March, 1987, three copies of Petitioners' Reply Memorandum in the above-entitled case were mailed, first class postage prepaid, to John A. Spinuzzi, Box 50958, Denton, Texas, 76206, and three copies were mailed to Michael F. Linz, 400 Katy Bldg., Dallas, Texas, 75202, counsel for all the respondents herein. I further certify that all parties required to be served have been served.

/s/ BRADEN W. SPARKS

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JOINT

APPENDIX

(5)

No. 86-805

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

BILLY J. "B.J." PINTER, *et al.*, *Petitioners*,

v.

MAURICE DAHL, *et al.*, *Respondents*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI
FILED NOVEMBER 19, 1986
CERTIORARI GRANTED APRIL 20, 1987

INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Nov. 22, 1982 — Plaintiffs' original petition filed in U.S. District Court for Northern District of Texas, Dallas Division.

Sept. 1, 1983 — Order directing plaintiffs to file an amended complaint.

Sept. 27, 1983 — Plaintiffs' first amended complaint.

Nov. 28, 1983 — Defendants' reply to plaintiffs' first amended complaint filed.

Dec. 22, 1983 — Answer of Maurice Dahl to counterclaim of defendants filed.

May 22, 1984 — Trial before the Court begins.

May 23, 1984 — Court trial continued.

June 22, 1984 — Court trial continued.

July 13, 1984 — Court trial continued; trial ended.

Sept. 21, 1984 — Memorandum of decision filed.

Oct. 3, 1984 — Judgment filed.

Oct. 31, 1984 — Defendants' notice of appeal filed.

April 18, 1986 — Opinion and judgment of Court of Appeals for the Fifth Circuit.

July 21, 1986 — Opinion of the Court of Appeals for the Fifth Circuit on petition for rehearing and suggestion for rehearing en banc.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
Civil Action No. 3-82-1867-G

PLAINTIFFS

MAURICE DAHL, GARY CLARK, W. GRANTHAM,
ROBERT J. DANIELE, CHARLES DAHL,
DOWAYNE C. BOCKMAN, RAY DILBECK,
RICHARD KOON, ART OVERGAARD,
JACK YEAGER, ACCRA TRONICS
SEALS CORP., and AARON HELLER

DEFENDANTS

BILLY J. "B.J." PINTER,
BLACK GOLD OIL COMPANY,
PINTER ENERGY COMPANY,
and PINTER OIL COMPANY

CAUSE

Violation of Securities Act of 1933; 15 U.S.C. 77a et seq., & Securities Exchange Act of 1934, 15 U.S.C. 78aa et. seq., (2) Violations of California & Texas Securities Act (Pendant jurisdiction, (3) Actual & punitive damages. Seeks 75,000 plus interest.

ATTORNEYS

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FILING FEES PAID **STATISTICAL CARDS**

Date	Receipt Number		C.D. Number	Card-Date Mailed
11/22/82	R#50595	$60.00		JS-5
5/18/84	#4127		$250.00 fine - paid by John A. Spinuzzi	JS-6
5/21/84	#4159		$250.00 fine - Maurice Dahl OCT 31, 1984	

Date	Nr.	PROCEEDINGS Judge A. Jo Fish	Civil 3-82-1867-G
11-22-82	1	Filed COMPLAINT. Summons Issued (4)	
		* * * * *	
9-1-83	65	Filed ORDER: (See Order for further details) Plaintiffs ordered to file an amended complaint within twenty days from date of this order, setting forth with particularity the matters described above. Defendants' motion to dismiss the complaint or to strike the fraud allegations is DENIED, without prejudice to its refiling should plaintiffs fail to comply with this court order within the prescribed time period (Copies to counsel)	
		* * * * *	
9-27-83	73A	Filed Plaintiff's FIRST AMENDED COMPLAINT	
		* * * * *	
11-28-83	82	Filed DEFENDANTS' REPLY TO PLAINTIFFS' FIRST AMENDED COMPLAINT	
12-22-83	136	Filed ANSWER OF MAURICE DAHL TO COUNTERCLAIM OF DEFENDANTS	
		* * * * *	
4-3-84	163	Filed Defendants' MOTION FOR REALIGNMENT OF PARTIES AND FOR DISQUALIFICATION OF AN ATTORNEY	

4-3-84 169 Filed Defendants' BRIEF IN SUPPORT OF MOTION TO REALIGN PARTIES AND TO DISQUALIFY ATTORNEY OF RECORD

* * * * *

4-19-84 187 Filed ORDER OF REFERENCE - the Defendants' motion to realign parties and to disqualify counsel - and the parties are ordered to appear on April 24, 1984 at 2:30 p.m. for a hearing before Magistrate Tolle. Copies to Counsel 4-20-84

4-25-84 189 Filed ORDER: ... ORDERED that defendant's motion to realign parties and disqualify counsel is denied (Copies to counsel)

5-4-84 190 Filed DEFENDANTS' AND COUNTER-CLAIMANTS' APPLICATION FOR REVIEW OF MAGISTRATE'S ORDER

* * * * *

5-22-84 253 Filed PROPOSED PRETRIAL ORDER OF DEFENDANTS BILLY J. "B.J." PINTER, ET AL

5-22-84 270 Filed PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF DEFENDANTS B.J. PINTER, ET AL

* * * * *

5-22-84 Filed ME: Court Trial continued

5-23-84 Filed ME: Court Trial continued

5-24-84 Filed ME: Court Trial continued; adjourn until June; to be resumed at date decided by court

* * * * *

6-22-84 333 Filed DEFENDANTS' SECOND SUPPLEMENTAL ANSWER RAISING ADDITIONAL AFFIRMATIVE DEFENSES

* * * * *

6-22-84 Filed ME: Court trial continued from 5-24-84

7-12-84 364 Filed AMENDED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF DEFENDANT BILLY J. "B.J." PINTER, ET AL

7-12-84 380 Filed Billy Pinter, Et Al's ADMISSIONS AND DENIALS CONCERNING PLAINTIFFS' FINDINGS OF FACTS

7-13-84 Filed ME: ... Court Trial continued from June 84; Trial Ended; Findings to Follow

7-27-84 387 Filed SECOND AMENDED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF DEFENDANTS BILLY J. "B.J." PINTER, ET AL

7-27-84 407 Filed POST TRIAL BRIEF OF PLAINTIFFS

9-21-84 436 Filed MEMO OF DECISION: ... see Memo for specifics ... ORDERED that within 15 days of this date, counsel for plaintiffs submit proposed form of judgment consistent with foregoing findings and conclusions (Copies to counsel) Docketed 9-21-84

10- 3-84 446 Filed JUDGMENT: ... ORDERED that each of plaintiffs have judgment against B.J. Pinter, individually and d/b/a Black Gold Oil Co. in the amount of their purchase price for securities purchased, plus prejudgment interest thereon at 6% per year from date of payment of their purchase price in May 1981, less the amount of any income a plaintiff received on the security, all as follows:

Plaintiff/Purchaser	Total Purchase	6% Pre-judgment Interest	Less (income received)	Total Judgment
Accra Tronics Seals Corp.	$ 7,480	$ 1,496	-0-	$ 8,976
Gary Clark	7,480	1,496	-0-	8,976
Robert Daniele	7,480	1,496	-0-	8,976
Charles Dahl	7,480	1,496	-0-	8,976
Dowayne C. Bockman	7,480	1,496	-0-	8,976
Ray Dilbeck	7,480	1,496	-0-	8,976
Richard Koon	7,480	1,496	-0-	8,976
Arthur Overgaard	7,480	1,496	-0-	8,976
Jack Yeager	7,480	1,496	-0-	8,976
Wendy Grantham	7,265	1,453	(2,186.77)	6,531.23
Aaron Heller	7,150	1,430	(4,373.55)	4,206.45
Maurice Dahl	310,725	62,145	(15,307.38)	357,562.62

10- 3-84 Judgment continued ... FURTHER ORDERED that Plaintiffs have postjudgment interest upon judgment sums at rate of 10% per year from date of entry hereof until paid; FURTHER ORDERED that defendants take nothing by their counterclaims against plaintiffs herein and all parties shall bear own costs of suit (Copies to counsel) Docketed 10-3-84

10-31-84 448 Filed Defendants' NOTICE OF APPEAL from the judgment entered October 3, 1984 (AIS to counsel by intake)

* * * * *

8-4-84 MANDATE (issued 7-31-86) and OPINION for the USCA5 ... affirming the decision of this court and ordering the defendants-appellants pay to plaintiffs-appellees the costs on appeal, to be taxed by the Clerk of USCA5

FIRST AMENDED COMPLAINT

Filed September 27, 1983
[Caption Omitted in Printing]

IV. ALLEGATIONS OF FACT

1. In 1980, M. DAHL decided that the oil business offered an opportunity to make a return upon an investment. M. DAHL did then get involved in the oil business and employed a Dallas, Texas person, one Dean Kirk, to assist M. DAHL in getting started in such a business.

2. During August, 1980, M. DAHL and his business associate, Bob Gottsch, were involved in drilling their first oil well. This well was known as the McFarland #1 and was located in Coleman County, Texas, near the town of Santa Anna, Texas. Dean Kirk was employed by M. DAHL and Gottsch in connection with the drilling and operation of the McFarland well. Mr. Kirk recommended B.J. PINTER to M. DAHL for the purpose of fracturing and completing the McFarland #1 well. On August 19, 1980, at the office of Puma Petroleum Company in the East Tower of the Northpark office building located near Central Expressway and Loop 12, Dallas, Texas B.J. PINTER met with M. DAHL. This was the first meeting between M. DAHL and PINTER and was relative only to the Mcfarland well. During this meeting PINTER held himself out to be a knowledgeable and experienced oilman with substantial geological and geophysical knowledge and with production in various states. PINTER was then employed as consultant and did prepare and establish the fracing and completion program for the McFarland #1 well. Other than this first meeting, all aspects of this completion program were through meetings and conversations between PINTER and Dean Kirk, the time and content of which are unknown to any Plaintiff.

3. In early September, 1980, M. DAHL was approached by a person who offered M. DAHL an opportunity to get involved in an oil play involving 9,000 acres in Mayes County, Oklahoma. Because PINTER had previously told

M. DAHL that he had production and experience in Oklahoma, M. DAHL made a telephone call from Newport Beach, California to B.J. PINTER in Dallas, Texas to get PINTER'S opinion as to the Mayes County leases. M. DAHL decided to not get involved in said leases. This was M. DAHL'S second contact with PINTER.

4. Several weeks later M. DAHL learned from Dean Kirk of an oil and gas lease located in Eastland and Callahan Counties, Texas. It had been reported by Kirk to M. DAHL that B.J. PINTER had done a radiometric evaluation of that lease, known as the Pope lease, and that PINTER owned an overriding royalty upon such lease. M. DAHL then contacted PINTER by telephone and made arrangements to employ PINTER to inspect and evaluate the Pope lease. On September 26, 1981, at approximately 2 P.M., M. DAHL did then meet with PINTER at the Pope lease. As a result of such meeting and the evaluation given by PINTER, in October, 1980, M. DAHL purchased the Pope lease at a cost of $60,000. Thereafter, PINTER started contacting M. DAHL on a regular basis concerning other oil and gas properties which PINTER knew of.

5. As a result of PINTER telephoning M.DAHL, PINTER met with M. DAHL on November 14, 1980. This meeting was held either at the offices of Puma Petroleum at Northpark Tower or at Denny's restaurant located in Dallas, Texas at the intersection of Buckner Blvd., and Highway 30. It developed that this Denny's Restaurant was near PINTER'S residence. All meetings held between PINTER and M. DAHL in Dallas, Texas were at one of these two locations. To the best recollection of M. DAHL only one or two meetings in Dallas with PINTER were at the Northpark Tower, and all other meetings in Dallas were at the identified Denny's Restaurant.

6. At the Dallas meeting on November 14, 1980, PINTER first told M. DAHL that he had a company called BLACK GOLD OIL COMPANY and presented, orally, to M. DAHL information concerning what PINTER called the "Clark

Prospect" covering two tracts of land encompassing 220 acres in Okmulgee, Oklahoma.

At this meeting, PINTER made some of the first representations concerning needing $200,000 to squeeze two existing wells upon the Clark lease and $15,000 to purchase such lease. Some of the hereinafter identified representations concerning the zones, costs and payout were also made at this meeting.

7. On November 21, 1980, M. DAHL was in Waynesburg, Pennsylvania and learned that PINTER had been trying to contact him concerning the Okmulgee property. That same day M. DAHL telephoned PINTER who was then staying at the Carriage Inn in Okmulgee, Oklahoma. As a result of this telephone conversation of November 21, 1980, M. DAHL agreed to meet with PINTER in Beggs, Oklahoma, a town approximately nine miles north of Okmulgee, Oklahoma.

8. On November 24, 1980, M. DAHL flew from Dallas, Texas to Tulsa, Oklahoma and then went by automobile from Tulsa, Oklahoma to Beggs, Oklahoma. M. Dahl met with PINTER at Beggs, Oklahoma and went with PINTER to view the leases PINTER called the Watson lease and the Clark lease. At this meeting at the lease sites, PINTER made numerous oral representations concerning these properties, which representations are hereinafter identified. One of the representations made that day by PINTER to M. DAHL was that these were such great properties, i.e. the Watson and Clark leases, that PINTER had ben trying to get them for two years.

9. During the period of November 24, 1980 to December 19, 1980, PINTER and M. DAHL had numerous telephone conversations concerning what was called by PINTER and M. DAHL the "5-well program" and/or the "Beggs, Oklahoma Project". These telephone conversations were conducted while PINTER was in Okmulgee, Oklahoma or Dallas, Texas and while M. DAHL was in Newport Beach, California or in Dallas, Texas. Some of these conversations were on or about November 26, 1980, December 3, 1980, December 16, 1980 and December 17, 1980.

10. On December 20, 1980 PINTER gave more information to M. DAHL concerning the Watson and Clark leases. At this meeting PINTER made the following representations:

(a) In order to hold the lease PINTER had nine months from December 9, 1980 to either drill a new well or to rework an existing well.

(b) That twelve months later two more wells needed to be reworked per the terms of the lease.

(c) A new well had to be drilled on the 70 acre lease to hold that lease.

(d) The two existing wells on the 150 acre tract were being purchased for $15,000 each, that the money must be paid then and leases would be conveyed later upon compliance with the drilling or rework commitments.

(e) The major pay zones upon the tracts, as hereinbelow identified.

(f) That production possibilities upon these two tracts was between 20 and 800 barrels of oil per well per day and approximately 3 million cubic feet of gas per day.

(g) That a well must be drilled on the Watkins lease by June 15, 1981.

(h) That these properties were particularly good because of the Gulf Youngstown water flood project 2 1/2 miles away, and also those hereinafter identified representations.

(i) Each well drilled upon these leases will hold 2 1/2 acres and must drill an additional well every six months.

11. During the period of time from approximately November 1, 1980 through July 31, 1981, M. DAHL had in excess of 100 telephone conversations with PINTER and had in excess of 15 personal meetings with PINTER, substantially all of which meetings were about PINTER'S proposals for drilling developing the Watkins lease, the two Clark leases,

the Antwine lease and the Doss lease. Some of the dates of these telephone conversations and personal meetings between PINTER and M. DAHL were as follows:

During 1980 on November 14, 21 24 and 26 and on December 3, 16 and 17. During 1981 on January 8, 9, 10, 12, 22, 23, 27, 28, 29, 30 and 31; February 2, 4, 6, 8, 9, 11, 24, 25; March 2, 4, 5, 6, 7, 13, 16 and 31; April 13, 18, 20 26 and 27; May 5, 6, 19, 21 and 28; June 6, 27 and 28; July 8, 14, 15 and 29. To the extent the content of such conversations are presently specifically recalled by M. DAHL, such are herein stated. To the extent oral statements were made by PINTER to M. DAHL but cannot be pinpointed by M. DAHL to a specific date, such are merely generally identified as statements made by PINTER to M. DAHL.

12. During the period of January, 1981 through July 1981, GRANTHAM had seven or eight meetings with PINTER concerning the here involved properties, each of such meetings being with PINTER and M. DAHL. Most of these meetings were in or near Beggs, Oklahoma. During this same time period GRANTHAM had several telephone conversations with PINTER. Except as herein otherwise specifically stated GRANTHAM is presently unable to specify the exact time and place of the representations made by PINTER to GRANTHAM and DAHL. GRANTHAM has from time to time also been told by M. DAHL of statements made by PINTER to M. DAHL concerning the five leases and proposed wells here involved.

13. Of the Plaintiffs in this action PINTER has had oral conversations and personal meetings only with M. DAHL and GRANTHAM. All other Plaintiffs herein obtained their information concerning the Doss and Antwine leases through M. DAHL.

14. During January, February and March, 1981, M. DAHL had numerous conversations with PINTER concerning the Watson-Clark leases and conerning what later became known to M. DAHL as the Doss and Antwine properties.

These telephone conversations were so frequent that they were almost daily and never less than three or four telephone conversations per week. It was during many of these telephone conversations that most of the representations herein identified were made by PINTER to M. DAHL concerning the above identified properties and concerning PINTER'S background, experience and financial worth which resulted from his oil business.

15. On or about January 29, 1981 and on or about February 4, 1981 M. DAHL met with PINTER in Dallas, Texas and also had telephone conversations with PINTER while he was in Okmulgee, Oklahoma. During these meetings PINTER made various representations concerning the Beggs, Oklahoma five well projects, including representations as to drilling and rework deadlines and estimated costs for such proposed drilling, completion and reworking projects. Many of the representations identified herein concerning such properties were then made by PINTER to M. DAHL. On or about these identified meeting dates PINTER delivered to M. DAHL that report entitled "Wilcox Sand Oil and Gas Drilling Prospect" and which report related to the Antwine and Doss leases. A copy of such report is hereto attached as Exhibit A. At the time PINTER delivered the Exhibit A Report to M. DAHL, PINTER told M. DAHL that the geological data contained in that report also applied to the Watkins and Clark leases and that such report could also be used by M. DAHL in considering the merits of the Clark and Watkins lease.

16. As a result of the many conversations between PINTER and M. DAHL, in person and by telephone, M. DAHL contacted his business associates, Bob Gottsch who resides in Nebraska. On February 6, 1981 Bob Gottsch, accompanied by M. DAHL, flew from Dallas, Texas to Beggs, Oklahoma. M. DAHL and Gottsch were taken by PINTER to the Watkins and Clark leases. While viewing these lease, PINTER again made the various representations identified below concerning the Watkins and Clark leases, including those identified representations concerning the Gulf water-

flood project, adjacent production, and the costs and anticipated production from the Clark-Watson leases.

17. On February 8, 1981 M. DAHL, accompanied by Plaintiff GRANTHAM drove to Beggs, Oklahoma specifically for the purpose of viewing and learning more from PINTER concerning the Doss and Antwine leases. During this meeting between PINTER, M. DAHL and GRANTHAM, PINTER made the following representations to M. DAHL and GRANTHAM:

(a) That other investors were already in the Doss and Antwine leases but that some interests were available because some investors were having financial problems.

(b) That M. DAHL and GRANTHAM had an inside chance to get into these two wells and to make some big money.

(c) That 80% to 90% of all wells PINTER drills are successful because he always drills offset wells.

(d) that PINTER graduated from Southern Methodist University and was or had the equivalent education to be a geologist, engineer or physicist.

(e) That he worked for Atlantic Richfield for years, had developed a black box while at such employment which utilized radiometrics to locate oil - all of which now keeps him ahead of his competitors.

18. During these many conversations between PINTER and M. DAHL it was mentioned on several occasions that it would take several millions of dollars to drill and develop the five leases (i.e. the two Clark leases and the Watkins, Doss and Antwine leases) with 20 to 30 wells. PINTER told M. DAHL that if M. DAHL HAD any friends who wanted to invest in these oil properties they could do so. M. DAHL told PINTER that he had some friends and business associates who might invest in a good oil deal. PINTER then made suggestions to M. DAHL on how to present the proposed oil ventures to the prospective investor friends of M.

DAHL. These conversations between PINTER and M. DAHL led M. DAHL to discuss these various oil investment opportunities with DAHL'S personal friends, business associates and relatives, including the above identified transaction with Bob Gottsch.

19. On or about February 27, 1981, PINTER met with M. DAHL and orally gave M. DAHL further information concerning the Doss and Antwine leases and proposed Antwine 2-C and Doss 3-B wells. On March 4, 1981 PINTER met with M. DAHL at Denny's Restaurant in Dallas, Texas and again discussed the various identified leases and proposed wells. Another meeting was had on or about March 11, 1981 between M. DAHL and PINTER during which meeting PINTER orally, and partly in writing, recited data concerning the offsetting production to the proposed Antwine 2-C and Doss 3-B wells.

20. All representations made to M. DAHL concerning the Clark, Watkins, Doss and Antwine leases were made to him by PINTER. Most, if not all, of such information or representations of PINTER were thereafter communicated by M. DAHL to GRANTHAM and many of such representations were also communicated by PINTER directly to GRANTHAM.

21. As a result of M. DAHL passing on to Bob Gottsch the oral representations made by PINTER to M. DAHL, M. DAHL induced Gottsch to travel to Beggs, Oklahoma, as set forth hereinabove. At such meeting in Beggs, Oklahoma, Gottsch was orally told by PINTER the herein identified representations concerning the Clark and Watkins leases. Thereafter Bob Gottsch invests $181,800 in the drilling of the Emanuel Clark well, the Walter Clark well and the F.B. Watkins wells and invested an additional $70,000 in the completion of such wells. Gottsch is not a party to this suit.

22. On April 26, 1981 M. DAHL and GRANTHAM met with PINTER at Beggs, Oklahoma and at the Watkins lease which was then being drilled. At this meeting PINTER

again discussed with M. DAHL and GRANTHAM the prospects for the Antwine 2-C and Doss 3-B wells and again made the various oral representations identified below.

23. On May 5, 1981 M. DAHL made a trip to Beggs, Oklahoma where PINTER was in the process of drilling the Clark lease. At some later date, the same rig was moved to the Antwine and Doss leases to drill the identified wells upon those leases.

24. On May 27, 1981 M. DAHL traveled to Beggs, Oklahoma and obtained a report of drilling and testing as to the Antwine 2-C and Doss 3-B leases. At this time M. DAHL turned over to PINTER the completion fund checks of the other Plaintiffs in the same manner as M. DAHL had previously delivered to PINTER the checks of such investors which was to pay drilling costs for the Antwine 2-C and Doss 3-B.

25. There hereinafter identified investors made their checks payable to BLACK GOLD OIL COMPANY and each of them received and signed a form of Agreement which is identical as to the typewritten portions of those agreements between M. DAHL and BLACK GOLD OIL COMPANY which are here attached as Exhibits C-1 and C-2.

26. On many occasions during the period February through April 1981 M. DAHL asked PINTER to put in written form the information PINTER had orally told M. DAHL about PINTER'S personal history, education, experience and financial condition so that it would be easier to present to prospective investor-friends and associates of M. DAHL. Thereafter PINTER did reduce such data to written form and delivered a copy to M. DAHL. A copy of such resume' and statement of financial condition of PINTER is hereto attached as Exhibit B.

27. In discussions between M. DAHL and his personal friends and business associates, M. DAHL primarily told such persons that he thought PINTER to be a knowledgable, experienced and successful oilman with leases that

were excellent prospects for production and that, based on all the data given him by PINTER, that he, M. DAHL, and his friend Bob Gottsch were going to invest approximately $500,000 with PINTER. Excluding GRANTHAM, all remaining Plaintiffs invested with BLACK GOLD OIL COMPANY primarily because M. DAHL had checked out PINTER and the properties and M. DAHL was sufficiently satisfied to make a substantial investment of his personal funds.

28. Thus, commencing on or about December 1980, and continuing to the date of filing of this Complaint, by use of means and instrumentalities of transportation in interstate commerce and by the use of the mails, the Defendants herein, individually and in concert by aiding, abetting and by participation in the wrongful acts hereinafter set forth, offered to sell, did sell and delivered after sale to Plaintiffs the following securities; to wit: (a) fractional undivided interests in oil, gas and other mineral rights, and (b) an investment contract, and (c) an interest or participation in and under an oil, gas or mining lease fee or title and contracts relating thereto, and (d) a profit sharing or participation agreement.

29. The specific interests offered, sold and delivered after sale by PINTER and BLACK GOLD to the various Plaintiffs were:

(a) Fractional undivided working interest in a drill site out of an oil and gas lease and a proposed well called the "Doss 3-B" located in Okmulgee County, Oklahoma.

(b) Fractional undivided working interests in a drill site out of an oil and gas lease and a proposed well called the "Doss 3-B" located in Okmulgee County, Oklahoma.

(c) Fractional undivided working interests in three drill sites out of three oil and gas leases and a three-well drilling program to drill the following proposed wells: the "F.B. Watkins 1-A", the "Walter Clark 1-C", and the "Emanuel Clark 1-B", all located in Okmulgee County, Oklahoma.

(d) An overriding royalty interest in the wells identified in (c) above.

30. During the period March 29, 1981 through May 28, 1981, Defendants PINTER and BLACK GOLD sold securities, including fractional undivided working interests, in the proposed "Antwine 2-C" well to the following Plaintiffs and for the sums identifies:

Plaintiff Purchaser	Interest Purchased	Total Amount Paid
Accra Tronics Seals Corp.	1/32nd	$ 7,480
Gary Clark	1/32nd	$ 7,480
Maurice Dahl	5/64ths	$18,700
W. Grantham	1/64th	$ 3,740
Robert J. Daniele	1/32nd	$ 7,480
Charles Dahl	1/32nd	$ 7,480
Dowayne C. Bockman	1/32nd	$ 7,480
Ray Dilbeck	1/32nd	$ 7,480
Richard Koon	1/32nd	$ 7,480
Art Overgaard	1/32nd	$ 7,480
Jack Yeager	1/32nd	$ 7,480
Total:	12/32nds	$89,760

31. During the period March 29, 1981 through May 21, 1981, Defendants PINTER and BLACK GOLD sold securities, including fractional undivided working interests, in the proposed "Doss 3-B" well to the following Plaintiffs and for the sums identified:

Plaintiff Purchaser	Interest Purchased	Total Amount Paid
Maurice Dahl	7/64ths	$25,025
W. Grantham	1/64ths	$ 3,575
Aaron Heller	1/32nd	$ 7,150
Total:	5/32nds	$42,900

Further, a business associate of M. DAHL, i.e. David Lund of England, who is not a party to this suit, also invest $7,150 with BLACK GOLD for a 1/32nd working interest in the Doss 3B well.

32. During the period April 20, 1981 through May 12, 1981, Defendants PINTER and BLACK GOLD sold securities, including fractional undivided working interest, to Plaintiff Maurice DAHL in the following proposed wells for the identified sums:

Well	Interest Purchased	Total Amount Paid
Emanuel Clark 1-B	3/8ths	$ 57,500
Walter Clark 1-C	3/8ths	$101,000
F.B. Watkins 1-A	3/8ths	$ 93,500

A copy of the agreements between BLACK GOLD and M. DAHL are hereto attached as Exhibits E (Watkins lease), F (Walter Clark lease) and G (Emanuel Clark lease).

33. On or about May 5, 1981, Defendants PINTER and BLACK GOLD sold to Maurice DAHL a 1/16th overriding royalty in the Walter Clark 1-C well and in the Emanuel Clark 1-A well for the total sum of $15,000.

34. As to each of the wells identified in paragraphs 4, 5 and 6, above, interest therein were sold by Defendants PINTER and BLACK GOLD to other investors, such other investors not being parties to this suit.

35. In connection with the offer, sale, purchase, and delivery after sale of said securities, the Defendants, individually and in concert participated in various manipulative and deceptive devices and contrivances in order to defraud Plaintiffs, including the resorting to and engaging in such acts and practices and courses of business as would operate as a fraud and deceit upon each of the Plaintiffs in order to obtain money and property from said Plaintiffs, and further included the making of untrue statements of material fact and the concealment of material facts necessary to make the statements made not misleading in the light of the circumstances under which such statements were made, all of which were by the direct or indirect use of means and instrumentalities of transportation and communication in interstate commerce and of the mails, as further specified hereinafter.

36. PINTER, for himself and for BLACK GOLD, PINECO and PINTER ENERGY, engaged in the following manipulative and deceptive devices as a general inducement to Plaintiffs to invest in the securities of Defendants:

(a) PINTER orally represented himself to M. DAHL and to GRANTHAM to be a physicist who had taken all the math and physics courses available at Southern Methodist University, and which educational background was partially responsible for his success as an oil and gas operator conducting exploration, development and production operations.l Such representations were false; in truth PINTER has no degrees from S.M.U., is not a physicist, and attended S.M.U. during the fall-spring semester of 1946-47 taking general undergraduate courses and again attending S.M.U. for an 18 week period in 1960 taking courses in the general field of engineering.

(b) PINTER orally represented himself to M. DAHL and to GRANTHAM to have been employed in the Geophysical Laboratory of Atlantic-Richfield in Dallas for a period in excess of eight years and during which period he was responsible for designing and developing technical equipment and procedures utilized in the oil and gas industry for exploration, development and operation of oil and gas properties. Such representations were false.

(c) PINTER orally represented himself to M. DAHL to be a successful, highly respected, oil and gas operator for a period of over twenty years with extensive experience and knowledge in the technical aspects of the oil and gas industry including but, not limited to: lease titles and documents; regulatory record keeping;p locating well-sites; determining sub-surface geophysical characteristics to locate offset locations on producing properties; monitoring and interpreting lithology and various type logging techniques so as to determine oil and gas formations, reserves and values; all phases of workover, entry and re-entry of wells and the installation of equipment for production and continued operation of oil and gas formations, reserves and values; all phases of workover, entry and re-entry of wells and the installation of

equipment for production and continued operation of oil and gas properties; and the knowledge for budgeting costs and expenses for drilling, completing and operating wells so as to produce a large profit return ratio. Such representations were false.

(d) PINTER orally represented himself to M. DAL and to GRANTHAM to be a highly successful operator in the exploration and production of oil and gas in the State of Texas, Arkansas and Oklahoma. Such representations were false.

(e) PINTER orally represented to M. DAHL and to GRANTHAM that he had less than 20% dry holes because he only drilled inside, offset locations to existing producing wells. Such representations were false.

(f) PINTER orally represented to M. DAHL that he had a large organization, the PINTER OIL COMPANY was the parent company and with Black Gold Oil Company being a form of division or subsidiary of PINTER OIL COMPANY, and that PINTER in such Companies, had a substantial in-house staff of qualified experienced office and field personnel. Such representations were false.

(g) PINTER orally represented to M. DAHL that because of his expertise in the oil and gas industry, he had been a technical consulting engineer with various substantial oil and gas companies and other businesses for number of years. Such representation was false.

(h) PINTER orally represented himself to M. DAHL to be financially successful with net worth exceeding several million dollars, all achieved as a result of his successful oil and gas operations. Such representation was false.

(i) PINTER orally represented to M. DAHL and to GRANTHAM that he had substantial daily and monthly oil and gas production which, if true, would represent gross revenues to the Defendant from monthly production in sums of hundreds of thousands of dollars. Such representation was false.

(j) PINTER falsely made the oral representation to M. DAHL and to GRANTHAM that BLACK GOLD had ownership of operating oil and gas properties with a substantial income being derived form such properties for the account of Black Gold.

(k) PINTER falsely made the oral and written representation to M. DAHL and GRANTHAM that the proposed Antwine 2-C well was to be an offset to three existing producing wells, each of which produced between 25-35 barrels of oil per day.

(l) PINTER orally represented to M. DAHL and to GRANTHAM that the Antwine 1-C well was producing between 25 to 30 barrels of oil per day and that the Antwine 2-C was to be drilled as a new hole to directly offset that existing production from the Antwine 1-C. Such representation was false and the Antwine 1-C was or should have been termed a "dry" hole, or at best, a non-commercial well.

(m) DAHL orally requested PINTER to provide him with the production records of the Antwine 1-C. In response to such request, PINTER orally advised M. DAHL and GRANTHAM that he had to shut in the Antwine 1-C because he had been delivered defective tubing which had collars and threads out of tolerance and, as a result of such defects, he was in the process of initiating a lawsuit against the manufacturer. PINTER further stated that the Antwine 1-C was capable of producing the prior stated amounts but for such defective tubing, and, further, PINTER orally represented that all of the zones in the Antwine 1-C had not yet been tested but that had those zones been tested and completed then the Antwine 1-C would produce daily amounts greater than 35 barrels of oil per day. Such representations were false.

(n) PINTER orally represented to M. DAHL and GRANTHAM, after drilling but prior to completion, that the Antwine 2-C well had a number of favorable pay zones with favorable porosity as reflected by drilling samples and the logs and that commercial production was obtainable from such well. Such representation was false.

(o) PINTER omitted to state th M. DAHL, GRANTHAM and the other Plaintiffs that the Wilcox formation in the Antwine 2-C was quite lower than the Wilcox formation in the Doss 3-B and would, therefore, probably be water saturated with little or no hope for oil production.

(p) PINTER orally represented to M. DAHL that the Walter Clark 1-C and the F.B. Watkins 1-A were to be drilled, respectively, to the depth of 3050' and 2800' to primarily test the Wilcox formation and that the Emanuel Clark 1-B was a re-entry project to test the Dutcher formation. PINTER orally represented to M. DAHL that the Watkins and Clark leases were of substantial value and would be productive for the following reasons, among others:

(i) That a 800 to 1000 acre tract about 2-3/4 miles southwest of the Watkins lease was being waterflooded by Gulf Oil Company, that such waterflood was started in 1961 and was yet active, and that such waterflood pressure would cause oil to flow to and be produced from the Watkins lease.

(ii) That immediately West of the Watkins lease was a 200 acre tract with 18 producing wells which produced $7,000,000 of oil from the Dutcher formation in two years, that after such production that tract and the 18 wells were sold to Gulf Oil Company for $7,500,000.

(iii) That in 1978 a well was drilled about 220' northwest of the northwest corner of the Watkins tract, and being about 440' from the proposed wellsite of the Watkins 1-A, ad that such well flowed 1800 barrels of oil per day.

(iv) That in 1978 another well was drilled about 1000' from the Watkins tract and which came in producing 1200 barrels of oil per day.

(v) That in 1978 two wells were drilled about 1200' north and northwest of the Watkins tract and each came in producing 750 barrels of oil per day.

(vi) That the Snow # 1 well northwest of the Watkins tract was a discovery well and flowed through the tubing an average of 1800 barrels of oil per day.

(vii) That the Gulf Oil Company waterflood project was putting pressure upon the Gulf lease offsetting the Watkins lease and that Gulf Oil Company was getting 35 to 100 barrels of oil per day per well from their leases offsetting the Watkins lease.

(viii) That nearby waterflood project were repressurizing or supercharging the Watkins and the Clark leases.

(ix) The waterflood project south of the Clark leases were continued during the period of 1945-58 and was closed under pressure, with such fact being important because the Clark leases are updip from the waterflood area and would have acquired repressurization from that waterflood project.

(q) PINTER orally represented to M. DAHL that the following major pay zones were located in the Watson and two Clark leases, with the presented facts being as follows:

Depth of Zone	Pay Zone	Extent/ thickness of Pay Zone	Content of Pay Zone
1800'	Bartlesville Sand	100'	50% oil, 50% water
1950'-2000'	Booch	140'-280	gas, with some oil
2450'-2600'	Dutcher		
	-Upper	8'-14'	oil or gas
	-Middle	10'-20'	oil
	-Lower	20'-50'	oil or water
2675'	Union Valley	20'-50'	oil
2700'-3050'	Mississippi	300'-350'	oil or gas
3100'	Viola	15'-35'	oil or gas
314	Wilcox (Main Pay-Bonanza)	5'-35'	oil

(r) PINTER orally and in writing represented to M. DAHL and to GRANTHAM that the following major pay zones were located in the Antwine and Doss leases, with the represented facts being as follows:

Depth of Zone	Pay Zone	Extent/ thickness of Pay Zone	Content of Pay Zone
1490'	Red Fork	30'	oil or gas
1557'	Bartlesville	93'	oil
1813'	Booch	248'	gas
2096	Dutcher (Upper)	28'	oil
2126'	Dutcher (Middle)	26'	oil
2160'	Dutcher (Lower)	24'	oil
2214'	Union Valley	30'-50'	oil or gas
2450'	Mississippi	200'	oil or gas
2551'	Viola	25'-40'	oil or gas
2067'	Wilcox	64'	oil

(s) PINTER falsely made the oral representation to M. DAHL that in 1098 he and drilled three successful wells upon the Doss lease and that all three wells were successful with stabilizing production of 25 to 35 barrels of oil per day.

(t) PINTER falsely made the oral representation to M. DAHL that the three prior drilled wells on the Doss lease have a 20 to 30 hear production life, would pay back their investment costs in about eighteen months producing 25 to 35 barrels of oil per day, and would provide a rate of investment return of $15 to $18:.1

(v) PINTER falsely made the oral representation to M. DAHL that the investors in the Doss 3-B well would be co-owners and tenants in common with BLACK GOLD and others in the leasehold estate.

(w) PINTER falsely made the oral and written representation to M. DAHL and GRANTHAM as to the Antwine and Doss ventures that he expected eight producing wells out of the eight wells to be drilled and tested, i.e. a 100% success ratio.

(x) PINTER falsely made the oral and written representation to M. DAHL and GRANTHAM as to the

Antwine-Doss tracts that such had the best drilling merit of any lease he had evaluated in the past twenty years.

(y) PINTER falsely made the oral and written representation to M. DAHL and GRANTHAM that the Antwine 2-C and Doss 3-B drilling prospects had a "AAAA rating for development," that very few drilling prospects can be so claimed in the present day climate of activity and that such prospects will soon become a thing of the past.

(z) PINTER falsely made the oral representation to M. DAHL and GRANTHAM that the reserves of oil in the Wilcox formation in the Doss 3-B well were 10 to 15 times the amount of money necessary to payout or return the investment capital of the investors to them and, in addition, there were substantial reserves behind the pipe in the Dutcher formation.

(aa) PINTER falsely made the oral representation to M. DAHL and GRANTHAM that payout of the Antwine 2-C and the Doss 3-B should occur in 12 to 18 months.

(bb) PINTER falsely made the oral representation to M. DAHL and GRANTHAM that the two offset wells to the Antwine 2-C produced between 32 to 38 barrels of oil per day for a period of eleven months and during the next five months their production fluctuated between 22 and 38 barrels of oil per day.

(cc) PINTER falsely made the oral representation to M. DAHL and GRANTHAM that wells in the area of the Antwine 2-C and the Doss 3-B have a 40 to 60 year production life, and that wells in that area had been operating for 60 years.

(dd) PINTER falsely made the oral representation to M. DAHL and GRANTHAM that any well drilled in the area of the Antwine 2-C or Doss 3-B might be a well producing 100 to 400 barrels of oil per day and, in the worst possible case should the sand have thinned out or be water cut, average production would be 10 barrels of oil per day.

(ee) PINTER falsely made the oral representation to M. DAHL and GRANTHAM that normal average production in the area was 28 to 30 barrels of oil per day and that the Doss 1-B well drilled in January 1980 had averaged 25 to 30 barrels of oil per day while the Doss 2-B well drilled in July 1980 also averaged 25 to 30 barrels of oil per day.

(ff) PINTER falsely made the oral and written representation to M. DAHL that only 90% of the money invested for drilling would be spent and that 10% of the drilling funds would be refunded and no completion funds would be spent should the wells not be capable of commercial production because casing would not be set nor the wells completed in such event. With reference to the Watkins-Clark leases, a copy of such written representation is hereto attached as Exhibit D.

37. In connection with the offer, sale and purchase of said securities, PINTER did omit to state and caused to be unstated material facts, which omissions had the effect of making other representation misleading in the light of the circumstances under which the other representation were made. The Defendants had a duty to disclose such omitted facts to Plaintiffs but Defendant chose to remain silent despite such duty in order to cause the Plaintiffs to make the investments and, further, to lull the Plaintiffs into a false sense of security as to their investments. Such ommissions, singly and in combination with each other, and in combination with other, and in combination with other hereinabove identified statements made by PINTER, constituted real and knowledgeable deception by Defendants. PINTER and the other Defendants failed and omitted to state:

(a) Facts concerning the business experience and knowledge of the staff and employee and managerial personnel of Defendants, particularly the fact the Defendants' staff and personnel consisted primarily of PINTER's family and that PINTER was the sole decision maker for the Defendant businesses.

(b) That the only income of substance received by PINTER and other Defendants for a number of years came from the public sale and distribution of securities in connection with Defendants' drilling ventures.

(c) That the proceeds being delivered by Plaintiffs to Defendants would not be set aside in a segregated or escrow account but would be deposited into general accounts of Defendants and comingled with other funds of various enterprises of Defendants and would thereafter be used partially for the purposes of drilling, testing, completing and equipping wells in which Plaintiffs had not acquired an interest.

(d) That there were a substantial number of dry and/or abandoned wells in the areas in which the proposed drilling was to be effectuate on behalf of the Plaintiffs.

(e) That the projections of oil recovery and income to be derived from operation of wells upon the involved leases were not supported by the production history and geology in the area surrounding the leases.

(f) That the results of other wells drilled by Defendants in the same areas as those to be drilled on behalf of Plaintiffs were indicative that commercial production in that area would be unlikely and, particularly, that such wells to be drilled as to Plaintiffs interests were unlikely to produce the volume as represented by Defendants.

(g) That Defendants' interests were in conflict with the interests of Plaintiffs whenever Defendants made the decision, without the recommendation of independent third parties to complete or not to complete a well because a decision to abandon a well as dry or unlikely to produce in commercial quantities would eliminate the investors expending sums for completion in questionable situations and because such abandonment would establish no value for Defendants' retained interests in that well and in the surrounding leaseholds owned by Defendants.

(h) That no portion of the costs of drilling and/or completion are borne by Defendants absent a cost overrun, the possibility of which was extremely unlikely to occur in view of the substantial built-in profit under the "turnkey" agreements.

(i) That the existence of "formation" in the vicinity of proposed well does not mean such will have sufficient or any hydrocarbons for commercial production and that any such hydrocarbons can be produced commercially due to the tightness of that formation.

(j) That the initial tests to determine the potential production of wells in the involved areas was historically insignificant and could not be used to reflect actual prospective production.

(k) That the amount and rate of future production cannot be determined with reasonable accuracy unless and until there has been a history of continuous production over a period of time sufficient to provide reliable data upon which an evaluation may reasonably be based.

(l) The historical actual daily and cumulative production from those wells in the surrounding area that were used as a basis for Defendants to state that the prospect wells in which Plaintiffs were to invest were excellent prospects.

(m) That PINTER almost always would complete wells so the liklihood of a refund of a portion of dry hole costs by the Defendants was unlikely to occur.

(n) That the turnkey price for drilling and testing the wells were not reasonable nor were they competitive with those prices charged at that time by other in the industry in the general area involved.

(o) That the turnkey price for completing and equipping the wells were not reasonable nor were they competitive with those prices charged at that time by others in the industry in the general area involved.

(p) That it was extremely unlikely the investors would receive a "payout" or return of their investment capital in

view of the high turnkey costs charged by Defendants and omitted to state the lack of or marginal rate of return reasonably anticipated from the wells in which Plaintiffs were to invest.

(q) That the terms "production" and "production status" are not the same and that Plaintiffs would be assessed costs outside of the "turnkey price" even though there were no production.

(r) the presence of the Dutcher formation upon tracts northwest of the Watkins tract was not representative of the Watkins tract, and that in fact there was no indication that the Dutcher formation was located under the Watkins tract.

(s) that the Watkins 1-A had no zones capable of producing commercially significant quantities of oil or gas.

(t) That although there was a slight possibility of some production from the Viola interval, the formation was extremely tight, with the most possible initial production to be in the range of 5 to 10 barrels of oil per day, with ultimate recovery to be only in terms of a few hundred barrels of oil so that the economics of a completion and equipping the well would be marginal at best.

(u) The presence of the Dutcher formation upon tracts northwest of the Watkins tract was no representative of either the Walter Clark tract nor the Emanuel Clark tract and there was no indication that such Dutcher formation was located under either of the Clark tracts nor was there evidence of such formation to be justify re-entry in the Emanuel Clark 1-B well.

(v) As to the Walter Clark 1-C, there were no commercially viable zones and such well should have been plugged and abandoned.

(w) That after the initial frac treatment in the Walter Clark 1-C, the effects of such treatment would dissipate immediately around the well bore and production would sharply decline to an average of 1 to 2 barrels of oil per day, all of which should have been known to PINTER because of

the low porosity of the Wapanucka/Union Valley formation treated in such well.

(x) As to the Clark 1-C, there were no commercially viable zones, that the Dutcher Sandstone was not present, that the Wapanucka/Union Valley limestone formation is tight formation that would yield only 1 or 2 barrels of oil per day after production resulting from the initial effects of the frac treatment immediately around the well bore dissipate.

(y) That a completion in the Wapanucka/Union Valley formation cannot be equated with production from other wells in the area.

(z) As to the Watkins 1-A, there could be no economical nor commercial production in significant quantities, there never could be a payout or return of investment capital, that the formations located were tight and that, if fortunate, recoverable reserves would only be some few hundred barrels.

(aa) That the C.M. Gordon 1-A well was not a producing gas well but in fact had been declared dry and abandoned by BLACK GOLD in 1978.

(bb) That the investors' interest in the leasehold tract as to the Antwine and the Doss would be limited to a one acre tract.

(cc) That the investors' interest in the leasehold tract as to the Antwine and Doss would be limited to production below 2500'.

38. As a part of the manipulative scheme and device Defendants employed artifice to defraud and engaged in acts, practices and courses of business which would and did operate as a fraud or deceit upon the Plaintiffs in connection with their purchase of said securities from Defendants, as follows:

(a) PINTER orally called upon M. DAHL and GRANTHAM for completion funds to be paid by Plaintiffs, stating to M. DAHL and GRANTHAM there were multiple zones with sufficient hydrocarbons with favorable porosity

for the commercial production of oil although the logs, lithology, and other known historical data reflected insufficient development of hydrocarbons and porosity, separately or in combination, to produce oil or gas in commercial quantities.

(b) Set pipe and spent money of Plaintiffs' for completion even though PINTER knew or should have known of the unliklihood of commercial production.

(c) PINTER orally stated to M. DAHL that the reason some of the historical wells in the area were classified as "dry holes" was because they were drilled in an era when the drillers did not have present day techniques and methods for testing and completing wells, and, that some holes were never intended to be producers because they were "promoted" wells.

(d) PINTER orally told M. DAHL that a well-planned drilling and development program should result in vast economic profit returns for all the participants actively involved with him, and that if they proceeded with him on the drilling prospect he would provide each investor with a high degree of success, large profit returns, and longevity production rates.

(e) PINTER delivered to Plaintiffs various oilfield reports which had little or no meaning to the investors, such reports having been structured to substantiate PINTER's representations of value of the tracts and prospects for commercial production.

(f) PINTER caused false information as to the historical oil and gas production of Defendants to be published in public records.

(g) Each of the misrepresentations and omissions of material fact as set forth in paragraphs 36 and 37, above, constitute acts and practices and a course of conduct of Defendants to deceive, defraud and injure Plaintiffs.

39. The actions of the Defendants reflect a deliberate and willful plan to deceive or, alternatively, a reckless disregard

of the rights of Plaintiffs and of duties of Defendants to Plaintiffs so as to constitute willful deception and intent to defraud Plaintiffs by manipulative and deceptive devices and contrivances.

V: CAUSE OF ACTION NO. ONE

MANIPULATIVE AND DECEPTIVE DEVICES AND CONTRIVANCES IN VIOLATION OF SECTION 10(b) AND RULE 10b-5 OF THE SECURITIES EXCHANGE ACT OF 1934, 15 U.S.C. SECTION 78j(b)

Each of the Plaintiffs complain of PINTER, BLACK GOLD, PINECO and PINTER ENERGY, bringing their claims and causes of action pursuant to Section 10(b) of the Securities Act of 1934, 15 U.S.C. 78j(b), as well as under Rule 10b-5 (17 C.F.R. 240.10b-5) promulgated by the Securities Exchange Commission pursuant to authority granted it in Section 10b, and would show the Court the following:

A. This Court has exclusive jurisdiction and venue over this cause of action is in this Court pursuant to Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. Section 78aa.

B. Plaintiffs re-allege and incorporated herein paragraphs 1 through 39, above.

VI: CAUSE OF ACTION NO. TWO

FRAUDULENT SALE OF SECURITIES IN VIOLATION OF SECTION 33A (2), TEXAS SECURITIES ACT

Plaintiffs complain of Defendants PINTER, BLACK GOLD, PINECO and PINTER ENERGY, bringing this action pursuant to Section 33A(2) of the Securities Act of the State of Texas, Article 581-33A(2), R.C.S., and pursuant to Article 27.01(a), Texas Business and Commerce Code, and would show the Court the following:

A. This Court has jurisdiction over this claim and count pursuant to pendant jurisdiction in connection with the above Causes of Action.

B. Plaintiffs allege and incorporate by reference herein the factual allegations contained in paragraphs 1 through 39 above, as if set out in full.

C. Plaintiffs were unaware of such untruths and omissions and could not have discovered such in the exercise of reasonable care.

VII: CAUSE OF ACTION NO. THREE

FRAUDULENT SALE OF SECURITIES IN VIOLATION OF SECTION 25401, CALIFORNIA CORPORATE SECURITIES ACT OF 1968

Plaintiffs, excluding GRANTHAM, complain of Defendants, PINTER, BLACK GOLD, PINECO and PINTER ENERGY, bringing this action pursuant to Section 25501 of the Corporate Securities Act of 1968 of the State of California, and would show the Court the following:

A. This Court has jurisdiction over this claim and count pursuant to pendant jurisdiction in connection with the above Causes of Action.

B. Plaintiffs allege and incorporate by reference herein the factual allegations contained in paragraphs 1 through 39 above, as if set out in full.

C. Plaintiffs were unaware of such untruths and omissions and could not have discovered such in the exercise of reasonable care.

VIII: CAUSE OF ACTION NO. FOUR

MISREPRESENTATIONS AND OMISSIONS OF MATERIAL FACTS BY MEANS OF PROSPECTUS OR ORAL COMMUNICATIONS IN VIOLATION OF SECTION 12(2), SECURITIES ACT OF 1933, 15 U.S.C. 771(2)

Plaintiffs complain of Defendants PINTER, BLACK GOLD, PINECO and PINTER ENERGY, bringing this action pursuant to Section 33A(2) of the Securities Act of

1933, 15 U.S.C. 771(2), and would show the Court the following:

A. This Court has jurisdiction over and venue of this claim and cause of action under and by virtue of Section 22, Securities Act of 1933, 15 U.S.C. 77v.

B. Plaintiffs allege and incorporate by reference herein the factual allegations contained in paragraphs 1 through 37, and in paragraph 39, above, as if set out in full.

IX: CAUSE OF ACTION NO. FIVE

SALE OF UNREGISTERED SECURITIES IN VIOLATION OF SECTION 33A(1) OF THE SECURITIES ACT OF THE STATE OF TEXAS

Plaintiffs complain of Defendants PINTER, BLACK GOLD, PINECO and PINTER ENERGY, bringing this action pursuant to Section 33A(1) of the Securities Act of the State of Texas, Article 581-33A(1), R.C.S. of Texas, and would show the Court the following:

A. This Court has jurisdiction over and venue on this claim and count pursuant to pendant jurisdiction.

B. Plaintiffs allege and incorporate by reference herein the factual allegations contained in paragraphs 1 through 39, above, as if set out in full.

C. That at the time of said offer, sale and delivery, said securities had not been registered under the Securities Act of the State of Texas, Article 581-1 (et.seq.), R.C.S. of Texas.

X: CAUSE OF ACTION NO. SIX

SALE OF UNREGISTERED SECURITIES IN VIOLATION OF SECTION 25110 OF THE CALIFORNIA CORPORATE SECURITIES ACT OF 1968

Plaintiffs, excluding GRANTHAM, complain of Defendants, PINTER, BLACK GOLD, PINECO and PINTER ENERGY, bringing this action pursuant to Section

25503 of the Corporate Securities Act of 1968 of the State of California, and would show the Court the following:

A. This Court has jurisdiction over and venue on this claim and count pursuant to pendant jurisdiction.

B. Plaintiffs allege and incorporate by reference herein the factual allegations set forth in paragraphs 1 through 39, above, as if here set out in full.

C. That at the time of said offer, sale and delivery, said securities had not been qualified under the Securities Act of the State of California, same being in violation of Section 25110.

XI: CAUSE OF ACTION NO. SEVEN

SALE OF UNREGISTERED SECURITIES IN VIOLATION OF SECTION 5 OF THE SECURITIES ACT OF 1933, 15 U.S.C. SECTION 77e

Plaintiffs complain of Defendants, PINTER, BLACK GOLD, PINECO and PINTER ENERGY, bringing this action pursuant to Section 12(1) of the Securities Act of 1933, as amended, 15 U.S.C. Section 77 1(1), and would show the Court the following:

A. This Court has jurisdiction over and venue on this claim and cause of action under and by virtue of Section 22, Securities Act of 1933, as amended, 15 U.S.C. 77v.

B. Commencing on or about May 1980 and continuing thereafter through October 1982, by the use and means of instrumentalities in interstate commerce and by the use of the mails, the Defendants herein, individually and in concert, by aiding, abetting and participation in the alleged wrongful acts, offered to sell and did sell to PLaintiffs, and did deliver to Plaintiffs after said offer and sale the following securities; to wit: (a) a fractional undivided interest in oil, gas and other mineral rights, (b) an investment contract and/or (c) a certificate of interest and participate in a profit sharing agreement.

C. At the time of said offer, sale and delivery of securities a registration statement as to those securities had not been

filed with the United States Securities and Exchange Commission and no registration statement was in effect nor was a registered prospectus delivered the Plaintiffs. Said offer, sale and delivery after sale were in violation of the registration provisions of Section 5, Securities Act of 1933, 15 U.S.C. 77e.

XII: CAUSE OF ACTION NO. EIGHT

VOIDABILITY OF CONTRACTS PURSUANT TO SECTION 29(b), SECURITIES EXCHANGE ACT OF 1934, 15 U.S.C. 78 cc(b)

Plaintiffs complain of Defendants, PINTER, BLACK GOLD, PINECO and PINTER ENERGY, bringing this action pursuant to Section 29(b), Securities Exchange Act of 1934, 15 U.S.C. 78 cc(b), and would show the Court the following:

A. This Court has jurisdiction over and venue on this claim and cause of action under and by virtue of Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. Section 78 aa.

B. Plaintiffs reallege and incorporate by reference herein the factual allegations contained in paragraphs 1 through 39, above, as if set out in full.

C. Plaintiffs seek to rescind, to cancel and to have declared void ab initio any and all contracts and agreements which may exist or which Defendants may assert to exist for the reason that each Defendant made or engaged in the performance of the violative contracts or, to the extent he or it may have acquired any rights under any such contracts or agreements, had actual knowledge of the facts hereinabove alleged and the making, performance or continuation of any and all such contracts or agreements involve the violation of the Securities Exchange Act of 1934 and rules and regulations thereunder.

XIII: CAUSE OF ACTION NO. NINE

PUNITIVE AND EXEMPLARY DAMAGES ARTICLE 4004, V.A.T.S.

A. For this cause of action, Plaintiffs reallege and incorporate by reference the factual allegations contained in Cause of Action No. Two.

B. Such offers, sales and purchases constitute transactions in real estate by actionable fraud and the above stated deceptive devices and contrivances, including material misrepresentations and concealment of past and existing material facts and false promises to do some act in the future were made and caused to be made by Defendants as a material inducement for these Plaintiffs to enter into such transactions and agreements. The Defendants willfully and knowingly made said false representations and promises and willfully and knowingly deceived by concealment and omission of material facts and knowingly took advantage of said fraud and derived the benefit of said fraud, all in violation of Title 65, Article 4004, V.A.T.S.

C. As a result of said unlawful acts, Plaintiffs are entitled to recover from Defendants, jointly and severally, actual damages and punitive and exemplary damages in an amount twice the actual damages proven.

XIV: TENDER OF SECURITIES

Plaintiffs tender to the Court for delivery to the Defendants each of the hereinabove identified securities which Plaintiffs purchased from the Defendants.

REQUESTS FOR RELIEF

In consideration of the allegations set forth above, Plaintiffs ask that the Defendants be summoned to appear and answer herein and that upon the trial hereof Plaintiffs have judgment as follows:

A. *RESCISSION AND ACTUAL DAMAGES:* The sales to Plaintiffs be rescinded and set aside and that Plaintiffs

recover from Defendants, jointly and severally, actual damages from the six transactions and in the amounts set forth as follows, less any funds received by Plaintiffs as a return upon any such investments:

	Interest Purchased	Amount
(a) *Antwine 1-C well:*		
Accra Tronics Seals Corp.	1/32nd working interest	$7,480
Gary Clark	1/32nd working interest	$7,480
Maurice Dahl	5/64ths working interest	$18,700
W. Grantham	1/64th working interest	$3,740
Robert J. Daniele	1/32nd working interest	$7,480
Charles Dahl	1/32nd working interest	$7,480
Dowayne C. Bockman	1/32nd working interest	$7,480
Ray Dilbeck	1/32nd working interest	$7,480
Richard Koon	1/32nd working interest	$7,480
Art Overgaard	1/32nd working interest	$7,480
Jack Yeager	1/32nd working interest	$7,480
(b) *Doss 3-B well:*		
Maurice Dahl	7/64ths working interest	$25,025
W. Grantham	1/64th working interest	$3,575
Aaron Heller	1/32nd working interest	$7,150
(c) *Emanuel Clark 1-B well:*		
Maurice Dahl	3/8ths working interest	$57,500
(d) *Walter Clark 1-C well:*		
Maurice Dahl	3/8ths working interest	$101,000
(e) *F.B. Watkins 1-A well:*		
Maurice Dahl	3/8ths working interest	$93,500
(f) *Emanuel Clark and Walter Clark leases:*		
Maurice Dahl	1/16th overriding royalty	$15,000

B. *EXEMPLARY DAMAGES:* That Plaintiffs recover from the Defendants, jointly and severally, punitive and exemplary damages twice the amount of the said actual damages to punish the Defendants for their willful misconduct.

C. *ATTORNEYS FEES:* That Plaintiffs receive their reasonable and necessary attorney's fees herein including, to

the extent necessary, fees for the costs of successfully defending any appeal. Under the circumstances, Plaintiffs would show the Court a reasonable attorney's fee would be in the range of 20% to 30% of the judgment sum and not less then $75,000 should there be a trial on merits.

D. *INTEREST AND COURT COSTS:* That Plaintiffs receive interest on the amount delivered to Defendants from the date of such payment to the date of judgment at the maximum legal rate permitted by the laws of the State of California or, alternatively, by the State of Texas, with judgment from the date of judgment herein at judgment rate and for their costs of Court.

E. *GENERAL RELIEF:* Plaintiffs ask for such other and further relief, in law or in equity, as they may show themselves entitled.

DEFENDANTS' REPLY TO PLAINTIFFS' FIRST AMENDED COMPLAINT

Filed November 28, 1983
[Caption Omitted in Printing]

* * * * *

III.

Response to Plaintiffs' General Statement of the Nature of Actions and Relief Sought

Defendants would show the Court that Plaintiffs' causes of action are unfounded, and more specifically, that:

(a) No violation of the anti-fraud provisions of the Federal Securities Exchange Act of 1934, Scetion 10b, 125 U.S.C. 78j(b), or in violation of Section 33A(2) of the Texas Securities Act. or of Sectrion 25401, California Corporate Securities Act, has occurred.

(b) No offer, sale, or delivery after sale of unregistered securities has occurred in violation of Section 5, Securities Act, 15 U.S.C. 77e, Section 33A(1), Texas Securities Act, or Section 25110, California Corporate Securities Act.

(c) No misrepresentation or admission of material facts have occurred in violation of Section 12, Securities Act of 1933, 15 U.S.C. Section 77(1).

Defendants deny Plaintiff's right to recover either actual or exemplary damages herein.

IV.

Defendants' Response to Plaintiffs' "Allegation of Facts"

DENIALS AND ADMISSIONS

1. As to Paragraph IV(1) of the Plaintiffs' First Amended Complaint (hereinafter, "PFAC") the Defendants have insufficient information from which to frame a response.

2. As to Paragraph IV(2), PFAC, the Defendants are without sufficient information from which to frame a

response to the allegations that the Plaintiff M. Dahl was involved in drilling his first oil well in August of 1980. It is admitted that the Plaintiff M. Dahl and Bob Gottsch have acted together in business ventures in the past. It is admitted that Dean Kirk was employed by M. Dahl and Gottsch in connection with the drilling and without sufficient information to frame a response to the allegation that Kirk recommended B.J. Pinter to M. Dahl for the purpose of performing fracturing and completing procedures on the McFarland well, but admit that Pinter recommended such a program informally to Kirk at this time. Defendants admit that Pinter, at Kirk's suggestion, met M. Dahl at some later time at Dahl's Puma Petroleum office, but it is denied that Pinter met with Dahl for the specific purpose of preparing a fracturing and completion program for the McFarland #1 well. The meeting was a "get acquainted" type meeting. Defendants admit that Pinter verbally answered Dahl's questions concerning Pinter's experience as an oil and gas operator. It is admitted that Pinter informed Dahl that Pinter had producing wells in Texas, Oklahoma and Louisiana. In all other respects, the allegations of Paragraph IV(2) are denied.

3. As to Paragraph IV(3), PFAC, the Defendants are without sufficient information to frame a response to the first sentence. The Defendants admit that Pinter had previously informed Dahl as to the extent of his production in Oklahoma, as referenced in the immediately preceding paragraph. Defendants deny that Dahl telephoned Pinter sometime in September, 1980 concerning certain leases in Mayes County, Oklahoma. Defendants are without sufficient information to frame a response to the allegation that Dahl decided not to get involved in the Mayes County leases. The remaining allegations in Paragraph IV(3) are denied.

4. As to Paragraph IV(4), PFAC, the Defendants are without sufficient information to frame a response to the first two sentences. Defendants admit that Dahl, acting as Puma Petroleum, employed Pinter to inspect and evaluate the oil and gas lease commonly known as the "Pope Lease," and that at Dahl's request, Pinter submitted a written

evaluation of said lease to Dahl. It is admitted that Dahl purchased the Pope lease after receiving evaluation thereof. The Devendants are without sufficient information upon which to frame a response to the allegation that the cost of the lease was $60,000.00. It is denied that Pinter "started contacting" Dahl on a regular basis concerning oil and gas prospects, and asserted that Dahl began contacting Pinter for this purpose, both personally and through Dean Kirk. In all other respects, the allegations of Paragraph IV(4) are denied.

5. As to Paragraph IV(5), PFAC, it is asserted that at Dahl's request, Pinter met Dahl at a Denny's Restaurant at Jim Miller and I-30 for coffee some time in November, 1980. At this meeting Dahl brought up the possibility of a joint venture between Dahl's purported oil company, Puma Petroleum, and Pinter. It is admitted that at Dahl's request and because Pinter had no formal offices, subsequent to this meeting, the parties got together from time to time both at Denny's Restaurnt and in the Puma Petroleum offices at the Northpark Tower. The primary purpose of these meetings was to discuss drilling and lease prospects. In all other respects, the allegations of Paragraph IV(5) are denied.

6. As to Paragraph IV(6), PFAC, it is denied that Pinter first told Dahl that he had a company called Black Gold Oil Company on November 14, 1980, and asserted that this had been discussed at the initial meeting. It is asserted that Dahl was aware that Pinter was operating under this name in Oklahoma prior to this date. It is asserted that at this meeting, Dahl asked Pinter about the possibility of drilling on any tracts in Oklahoma owned by Pinter or otherwise available and that, in response to this question, Pinter told Dahl of three leases known as the "Emanuel Clark," consisting of 150 acres, the "Walter Clark," consisting of 70 acres and the "F. B. Watkins," consisting of 80 acres, all of which were located in Okmulgee County, Oklahoma. It is asserted that Pinter indicated to Dahl that these leases had merit as exploration prospects. It is also asserted that later, and at Dahl's request, Pinter prepared an estimated cost or budget sheet for reentering the Emmanuel Clark No. 1-B well and

drilling a new well on the Walter Clark, known as the No. 1-C, to a total depth sufficient to test the Wilcox formation, and in addition an estimated budget for drilling a well to be known as the F. B. Watkins 1-A well, to the Wilcox formation, as required by the landowner. It is specifically denied that Pinter made a rough estimate of $200,000 as the cost of "squeezing the two existing wells on the Clark lease." As to the cost of acquiring the Emmanuel and Walter Clark leases, it is asserted that Pinter told Dahl that the amount would be $12,000 to $15,000 to obtain the leases and a preliminary title opinion, and that Dahl offered to put up the capital in exchange for a 1/16 overriding royalty interest in these leases. As to the Plaintiff's allegations concerning "hereinafter identified representations," the Defendant's responses to each such representation are incorporated herein. In all other respect, the allegations in Paragraph IV(6) are denied.

7. As to Paragraph IV(7), PFAC, it is admitted that in November, 1980 Dahl was in Waynesburg, Pennsylvania, assertedly for the purpose of acquiring 20 to 30 producing oil and gas wells. It is further asserted that Pinter told Kirk at this time that Pinter could obtain the leases discussed in the preceding paragraph hereto. It is admitted that Dahl subsequently telephoned Pinter to inquire about the purchase of the leases apparently after talking to Kirk, who was in Dallas. It is asserted that Pinter suggested to Dahl that he inspect the leases in person prior to purchase. Dahl and Pinter agreed to meet in Beggs, Oklahoma, jointly to inspect the potential drilling site. In all other respects, the allegations of Paragraph IV(7) are denied.

8. As to Paragraph IV(8), PFAC, it is admitted that Dahl arrived in Beggs, Oklahoma, on or about November 24, 1980, at which time Pinter drove Dahl to the Walter Clark lease and the adjacent Emmanuel Clark lease, and the F. B. Watkins lease, which was roughly four miles east of the Emmanuel Clark lease. As to the allegation that "numerous oral representations" were made by Pinter which are "hereinafter identified," the responses to each of these purported representations, to the extent they are subsequently

indentified elsewhere by the Plaintiff, are herein adopted. It is asserted that Pinter told Dahl only that these leases had merit as drilling or reentry prospects, as previously alleged herein. It is asserted that Pinter told Dahl that he had been waiting for the previous leases to expire for two years. In all other respects, the allegations of IV(8) are denied.

9. As to Paragraph IV(9), PFAC, it is asserted that numerous telephone conversations transpired between Pinter and Dahl during late November and early December, 1980, and that most of these conversations occurred while Dahl was in Dallas, Texas. It is admitted that on approximately three to four occasions Dahl conferred with Pinter from Newport Beach, California. The Defendants are without sufficient information upon which to base a response to the allegation that certain conversations occurred on November 26, 1980, December 3, 1980, December 16, 1980 and December 17, 1980. It is denied that these wells were commonly referred to or called "the five well program" or the "Beggs, Oklahoma project." The wells and leases were referred to individually, by name and number only. In all other respects, the allegations of Paragraph IV(9) are denied.

10. As to Paragraph IV(10), PFAC, it is admitted that at Dahl's request, Pinter met with Dahl at the Denny's Restaurant on Jim Miller and I-30 in Dallas, Texas on December 20, 1980 to discuss the three wells on the Clark and Watkins leases. As to the other representations found in Paragraph 10, PFAC, the responses thereto are as follows:

(a) As to Paragraph IV(10)(a), PFAC, it is asserted that the primary term of the Watkins lease was six months as required by the landowner.

(b) As to Paragraph IV(10)(b), PFAC, the allegations contained therein are denied.

(c) As to Paragraph IV(10)(c), PFAC, the allegations contained therein are denied. It is asserted that Dahl and Pinter discussed the fact that a new well would have to be drilled on the 70 acre Walter Clark lease within the twelve month primary term in order to hold the lease.

(d) As to Paragraph IV(10)(d), PFAC, it is asserted that the $15,000 was for the purchase of the referenced leases, and that drilling would be required during the primary terms of the leases to hold them in force, and that Dahl was aware of and had discussed these facts with Pinter.

(e) As to Paragraph IV(10)(e), PFAC, regarding the alleged misrepresentations concerning "the major pay zones upon the tracts. as hereinbelow identified," Defendants are unable to respond to such an allegation without further identifying information. To the extent that such allegations may be later identified, Defendants incorporate herein their response thereto.

(f) As to Paragraph IV(10)(f), PFAC, the allegations contained therein are denied.

(g) As to Paragraph IV(10)(g), PFAC, the allegations contained therein are denied. It is admitted that Pinter informed Dahl that the primary term of the Watkins leases would require the drilling of a well on the Watkins lease within six months, as required by the landowner.

(h) As to Paragraph IV(10)(h), PFAC, the allegations contained therein are denied. It is asserted that Pinter told Dahl that the Gulf Youngstown water-flood project which was two and one half miles south of the Watkins lease, could possibly influence the "reservoir pressure," which might improve the oil drainage factor on the Dutcher Formation underlying the west end of the Watkins lease. As to those "hereinafter identified representations," such allegation is so vague and ill-defined that it defied a response; however, to the extent that subsequent representations are alleged by the Plaintiffs which call for a response by the Defendants, the Defendants herein adopt said response.

(i) As to Paragraph IV(10)(i), PFAC, the allegations contained therein are denied. It is asserted that Pinter told Dahl that there would be an assignment of a well leases tract on each well drilled consisting of two and one-half to five acres in size, depending on drainage.

11. As to Paragraph IV(11), PFAC, the Defendants are without sufficient information upon which to base a response to the allegations of dates, times and numbers of telephone calls and personal meetings set forth in Paragraph IV(11), except to aver that such estimate is grossly exaggerated in quantity. It is asserted that these calls were initiated by Dahl on the vast majority of occasions. It is asserted that the Doss and Antwine lease tracts were not even discussed until the completion phase of the Watkins and Clark wells. As to the last two sentences of Paragraph IV(11), Defendants adopt their particular responses to any representations which the Plaintiffs thus attempt to incorporate in Paragraph IV(11). In all other respects, the allegations of Paragraph IV(11) are denied.

12. As to Paragraph IV(12), PFAC, it is asserted that W. ("Wendy") Grantham, Plaintiff herein, was the regular companion, girlfriend and purported "fiance" of Dahl, and accompanied Dahl on a number of business trips to the leasehold sites in such erstwhile capacity. It is asserted that Dahl and Pinter engaged in a number of conversations concerning the various wells between January 1981 and July 1981 wherein Grantham was thus present. Because the Plaintiffs include no information as to the substantive nature of the alleged representation made by Pinter "to Grantham," the Defendants are unable to frame a response to the remaining allegations contained in Paragraph IV(12). The Defendants are without sufficient information to frame a response to the allegations that Dahl made statements to Grantham concerning statements made by Pinter to Dahl. Such allegations are wholly vague and legally insufficient to apprise the Defendants as to the date, time, place and substance of alleged misrepresentation thus made, if any. In all other respects, the allegations of Paragraph IV(12) are denied.

13. As to Paragraph IV(13), PFAC, it is admitted that Pinter has had no oral conversation or personal meeting with any Plaintiff other than Dahl and Grantham. It is asserted that all other Plaintiffs had interests only in the

Doss 3-B and Antwine 2-C wells, and that they obtained all substantive information which they received concerning their interest from Dahl. It is asserted that Dahl told Pinter repeatedly that he wanted to sell interests in the Doss 3-B and Antwine 2-C wells to his friends and business associates for a commission, and that Dahl also told Pinter that such interests would be sold only to qualified, sophisticated and knowledgeable oil and gas investors. Dahl then sold such interest to Gary Clark, Robert J. Daniele, Charles Dahl, Dowayne C. Bockman, Ray Dilbeck, Charles Koon, Art Overgaard, Jack Yeager, Accra Tronics Seals Corp., and Aaron Heller, and delivered checks for such interests to Pinter. In all other respects, the allegations of Paragraph IV(13) are denied.

14. As to Paragraph IV(14), PFAC, the first sentence is admitted. With regard to the second sentence and the allegations concerning "representation herein identified" and 'Pinter's background, experience and financial worth which resulted form his oil business," these allegations are denied.

15. As to Paragraph IV(15), PFAC, the allegations are denied. It is asserted that Pinter told Dahl that the geological formations underlying the Antwine and Doss leases should also be present under the Watkins and Clark leases, and that the "Wilcox Sand Oil and Gas Drilling Prospect" contained substantive information with regard only to the Doss and Antwine leases. In all other respects, the allegations of Paragraph IV(15) are denied.

16. As to Paragraph IV(16), PFAC, it is asserted that Gottsch was an investor in the early wells on the Watkins and Clark leases and was not associated with the Doss and Antwine lease tracts. Defendants are without sufficient information from which to frame a response to the first and second sentences. The third sentence is admitted. As to the remainder of Paragraph IV(16), the Defendant's responses to these elsewhere identified representations are incorporated herein. In all other respects, the allegations of Paragraph IV(16) are denied.

17. As to Paragraph IV(17), PFAC, the February 8, 1981 meeting between Dahl, Grantham and Pinter concerning the Doss and Antwine leases in Beggs, Oklahoma is admitted. As to the representations alleged to have occurred on such date, the response to each is as follows:

(a) As to Paragraph IV(17)(a), PFAC, the allegations contained therein are admitted.

(b) As to Paragraph IV(17)(b), PFAC, the allegations contained therein are denied. It is asserted that Pinter told Dahl in Grantham's presence that Dahl could purchase an individual interest if he desired to do so and that a good chance existed to obtain oil or gas production.

(c) As to Paragraph IV(17)(c), PFAC, the allegations contained therein are denied.

(d) As to Paragraph IV(17)(d), PFAC, the allegations contained therein are denied.

(e) As to Paragraph IV(17)(e), PFAC, the allegations contained therein are denied.

18. As to Paragraph IV(18), PFAC, the first sentence is denied. It is asserted that Dahl told Pinter that Dahl had a number of friends and business associates who would be interested in investing in these properties and that Dahl wished to obtain such investors, in exchange for doing so, wanted to receive in response a 10% commission fee, based on the extent of their monetary participation. It is asserted that Dahl told Pinter that he desired to propose the purchase of an interest to a very small number of qualified friends and acquaintances. It is specifically denied that Pinter engage in any discussion with Dahl concerning "how to present the proposed oil ventures to the perspective investor friends of M. Dahl." The Defendants have no personal knowledge of the substantive information related to Dahl's personal friends, business associates and relatives by Dahl, or as to the substantive information relayed to Gottsch. In all other respects, the remaining allegations in Paragraph IV(18) are denied.

19. As to Paragraph IV(19), PFAC, Defendants are without sufficient information upon which to frame a response to these allegations, because the Plaintiffs failed to identify what "further information" Pinter is alleged to have given M. Dahl on February 27, 1981. Secondly, Paragraph IV(19) references written representations but fails to attach or reference any writing.

20. As to Paragraph IV(20), PFAC, Defendants are without sufficient information upon which to frame a response to these allegations.

21. As to Paragraph IV(21), PFAC, Defendants are without sufficient information upon which to frame a response to these allegations. It is asserted that Bob Gottsch invested $181,800.00 in the re-entry of the Emanuel Clark well, the drilling of the Walter Clark well and the drilling of the F.B. Watkins well and an additional $70,000.00 in the completion of such wells. It is admitted that Gottsch is not a party to this suit.

22. As to Paragraph IV(22), PFAC, it is admitted that Pinter met with M. Dahl and Grantham at Beggs, Oklahoma on or about April 26, 1981 and at the Watkins lease which was being drilled at that time. It is admitted that Pinter again discussed with Dahl and Grantham at this time the prospects for the Antwine 2-C and Doss 3-B wells. The remaining allegations in Paragraph IV(22) are denied.

23. As to Paragraph IV(23), PFAC, the Allegations contained therein are admitted.

24. As to Paragraph IV(24A), PFAC, it is asserted that on or about May 24, 1981 M. Dahl travelled to Beggs, Oklahoma, where he asked for and received a verbal report from Pinter concerning the drilling and testing work in progress on the Antwine 2-C and Doss 3-B leases. It is further asserted that at this time, Dahl asked for and received blank stationary from the temporary office facilities located at the well site. It is further asserted that Dahl then typed up a written report of drilling and testing as to the Antwine 2-C

and Doss 3-B leases which he then forwarded to the remaining investors. It is admitted that Dahl turned over to Pinter the completion fund checks of the other Plaintiffs at or about this time. It is further admitted that Dahl had previously delivered to Pinter checks from the other Plaintiffs to cover their prospective shares of drilling costs in the Antwine 2-C and Doss 3-B wells. In al! other respect, the allegations of Paragraph IV(24) are denied.

25. As to Paragraph IV(25), PFAC, the allegations contained therein are admitted.

26. As to Paragraph IV(26), PFAC, the allegations contained therein are denied.

27. As to Paragraph IV(27), PFAC, Defendants are without sufficient information upon which to frame a response.

28. As to Paragraph IV(28), PFAC, the allegations contained therein are denied.

29. As to Paragraph IV(29), PFAC, the allegations, and with respect to the specific interests obtained by the various Plaintiffs, the responses to such allegations are as follows:

(a) As to Paragraph IV(29)(a), PFAC, the interest identified are admitted.

(b) As to Paragraph IV(29)(b), PFAC, the interest identified are admitted.

(c) As to Paragraph IV(29)(c), PFAC, it is asserted that the Emanuel Clark 1-B well was e-entry; that the interest obtained by the Plaintiffs in the three wells wet forth in such sub-paragraph were fractional undivided working interests in oil and gas leases; denied that a "three-well drilling program" was contemplated, offered, sold or delivered after sale; and admitted that the three referenced wells were all located in Okmulgee County, Oklahoma. In all other respects, the allegations of Paragraph IV(29)(c) are denied.

(d) As to Paragraph IV(29)(d), PFAC, it is asserted that only M. Dahl received an overridng royalty interest, and that such interest was obtained only with regard to the Watkins and Clark leases. The remaining allegations in Paragraph IV(29)(d) are denied.

In all other respects, the allegations of Paragraph IV(29) are denied.

30. As to Paragraph IV(30), PFAC, the purchasers and respective percentages of interests purchased are admitted as to the Antwine 2-C well; the total amount paid is admitted, except with regard to M. Dahl and W. Grantham; and it is asserted that the total amount paid by Dahl and Grantham was reduced by $32,445.00, which amount represented commissions received by M. Dahl, W. Grantham, his girlfriend, and Dahl's purported oil companies, Wrangler and Puma. In all other respects, the allegations in Paragraph IV(30) are denied.

31. As to Paragraph IV(31), PFAC, the purchaser, respective interests purchased, and total amounts paid are admitted, except with regard to M. Dahl and W. Grantham. As to Dahl and Grantham, a portion of the amount of their interests was credited by reason of commissions received by Dahl, the total amount of which commissions is set forth in the immediately preceding paragraph. It is admitted that David Lund, a business associate of M. Dahl, also invested $7,150.00 with Black Gold, for which he received a 1/32 working interest in the Doss 3-B well. In all other respects, the allegations of Paragraph IV(31) are denied.

32. As to Paragraph IV(32), PFAC, the respective well sites and interests purchased are correct. The "total amount paid", as set forth in Paragraph IV(32) is denied. The authenticity of Exhibits "E", "F", and "G", PFAC, is admitted. In all other respects, the allegations of Paragraph IV(32) are denied.

33. As to Paragraph IV(33), PFAC, the allegations contained therein are denied. It is asserted that at the request

of M. Dahl, Pinter allowed Dahl to advance $15,000.00 to be used in obtaining the Watkins and Clark leases, in exchange for which Pinter conveyed to Dahl 1/16 overriding royalty in the Clark and Watkins leases. In all other respects, the allegations of Paragraph IV(33) are denied.

34. As to Paragraph IV(34), PFAC, the allegations contained therein are admitted.

35. As to Paragraph IV(35), PFAC, the allegations contained therein are denied.

36. As to Paragraph IV(36), PFAC, it is denied that Pinter either for himself or for Black Gold, Pineco, or Pinter Energy, as referenced in PFAC engaged in any manipulative or deceptive devices as an inducement to Plaintiffs to invest in the securities of the Defendants. As to the specific allegations contained in the remainder of Paragraph IV(36):

(a) As to Paragraph IV(36)(a), PFAC, it is denied that Pinter represented himself to M. Dahl to be a physicist, that he had taken all of the math and physics coursed available at Southern Methodist University, or that such alleged educational background was partially responsible for his success as an oil and gas operator conducting exploration, development and production operations. It is admitted that Pinter has no degree from S.M.U., is not a physicist, attended S.M.U. during the fall-spring semesters of 1946-47 taking general undergraduate courses, including some in the physical sciences, and that he again attended S.M.U. for an 18 week period in 1960 taking courses in the general field of engineering. In all other respects, the allegations of Paragraph IV(36)(a) are denied.

(b) As to Paragraph IV(36)(b), PFAC, it is admitted that Pinter represented to M. Dahl that he was at one time employed by the Geophysical Laboratory of Atlantic-Richfield in Dallas for a period of eleven years, during which period he assisted in the designing and development of technical equipment and procedures utilized in the oil and gas industry for exploration, development and operation of oil

and gas properties. It is denied that such representations were false. In all other respects, the allegations of Paragraph IV(36)(b) are denied.

(c) As to Paragraph IV(36)(c), PFAC, it is admitted that Pinter has been a successful oil and gas operator for a period of over twenty years with extensive experience and knowledge in the technical aspects of the oil and gas industry, and that Pinter has obtained a reasonable degree of respect among his peer in the oil and gas industry, and that Pinter so represented himself to M. Dahl. It is further admitted that Pinter represented to M. Dahl that his experience and knowledge includes various aspects of oil and gas lease titles and related documents, oil and gas regulatory requirements and related record keeping processes, the location and installation of well-sites, the determination of sub-surface geophysical characteristics necessitated in efforts designed to locate and drill upon qualified drill sites adjoining, abetting and offsetting areas where oil or gas has previously been located, drilled or produced, monitoring and interpretation of lithology, logging or charting techniques used to discover or evaluate oil and gas formations, reserves and values, all standards phases of workover, entry and re-entry of wells, the installation of equipment for the purpose of obtaining and maintaining the production of oil and gas from onshore well-sites, and general working knowledge as to the costs and expenses necessary for drilling, completing and operating wells. It is denied that such representations are false. In all other respects, the allegations of Paragraph IV(36)(c) are denied.

(d) As to Paragraph IV(36)(d), PFAC, it is admitted that Pinter represented himself to M. Dahl to have been successful on repeated occasions in the exploration for and operation of oil and gas properties and in the production of oil and gas from such properties, in Texas and Oklahoma. It is denied that such representation were false. In all other respects, the allegations of Paragraph IV(36)(d) are denied.

(e) As to Paragraph IV(36)(e), PFAC, it is admitted that Pinter represented to M. Dahl that he had a high success ratio in drilling producing wells and that one reason for such success was that Pinter had in the past successfully drilled offsetting locations to existing producing wells or inside proven locations. In all other respects, the allegations of Paragraph IV(36)(e) are denied.

(f) As to Paragraph IV(36)(f), PFAC, it is asserted that M. Dahl knew that Pinter was in the oil business as a sole proprietor and that his operations staff consisted primarily of his family. In all other respects, the allegations of Paragraph IV(36)(f) are denied.

(g) As to Paragraph IV(36)(g), PFAC, it is admitted that Pinter represented to M. Dahl that he had been consulted on technical aspects of oil and gas drilling by various substantial oil and gas companies for a number of years. It is denied that such representations were false. In all other respects, the allegations of Paragraph IV (36)(g) are denied.

(h) As to Paragraph IV(36)(h), PFAC, the allegations contained therein are denied in their entirety.

(i) As to Paragraph IV(36)(i), PFAC, the allegations contained therein are denied in their entirety.

(j) As to Paragraph IV(36)(j), PFAC, it is admitted that Pinter represented to M. Dahl that Black Gold owned, operated, and derived income from various oil and gas properties in Oklahoma. It is denied that such representations were false. In all other respects, the allegations of Paragraph IV(36)(j) are denied.

(k) As to Paragraph IV(36)(k), PFAC, it is admitted that Pinter represented to M. Dahl that the proposed Antwine 2-C well would offset three existing producing wells, and that those wells initially produced at a rate of 25 to 35 barrels of oil per day. It is denied that such representations were false. In all other respects, the allegations of Paragraph IV(36)(k) are denied.

(l) As to Paragraph IV(36)(l), PFAC, it is asserted that Pinter represented to M. Dahl that the Doss 1-B and 2-B wells had initially produced at a rate of 25 to 30 barrels of oil per day, and that the Antwine 2-C and Doss 3-B wells were to be drilled as new holes located between the Antwine 1-C and the Doss 1-B and 2-B wells. It is denied that such representations were false. Defendants are without sufficient information to form response to the allegation that the Antwine 1-C should be termed a "dry" hole or a non-commercial well. In all other respects, the allegations of Paragraph IV(36)(l) are denied.

(m) As to Paragraph IV(36)(m), PFAC, it is denied that Pinter provided certain production records of the Antwine 1-C well to M. Dahl both prior to and during the drilling and workover operations of said well. It is denied that Pinter advised M. Dahl that the Antwine 1-C well would have to be shut down because of defective tubing and asserted that Pinter informed M. Dahl that as a result of tubing defects, Pinter intended to initiate a lawsuit against the pipe manufacturer; denied that Pinter stated that the Antwine 1-C would ultimately produce any specific quantity of oil; and denied that Pinter represented that such production would be automatic had it not initially been for defective tubing. In all other respects, the allegations of Paragraph IV(36)(m) are denied.

(n) As to Paragraph IV(36)(n), PFAC, it is asserted that Pinter initially represented to M. Dahl that there were multiple zones to be tested in both the Antwine 1-C and 2-C wells. It is asserted that a producing well was ultimately made in the Antwine 1-C Red Fork Formation. It is further asserted that after testing the Antwine 1-C Red Fork Formation, Pinter learned, and thereafter informed M. Dahl, and the other investors, that the Red Fork Formation in the Antwine 2-C was "up dip" from the Red Fork in the Antwine 1-C, that the such formation could ultimately produce oil, and therefore, that the Red Fork should be completed and tested in the Antwine 2-C. It is denied that such representations were false.

(o) As to Paragraph IV(36)(o), PFAC, it is denied that Pinter knew or omitted to state that the Wilcox formation in the Antwine 2-C well was lower than the Wilcox formation in the Doss 3-B well, that thus there probably would be water saturation in the Wilcox zone of the Antwine 2-C well, or that there was little or no hope for oil production. In all other respects, the allegations of Paragraph IV(36)(o) are denied.

(p) As to Paragraph IV(36)(p), PFAC, it is admitted that Pinter represented to M. Dahl that the Walter Clark 1-C and the F.B. Watkins 1-A wells should be drilled, if possible, to the respective depths of 3,050 and 2,800 feet to test the Wilcox and other higher formations, and that the emanuel Clark 1-B well was a re-entry project designed to test the Dutcher formation. It is admitted that Pinter represented to M. Clark leases could produce substantial amounts of oil and gas, for the following reasons:

(i) That an 800 to 1000 acre water-flood project initiated by the Gulf Oil Company in 1961, about 2-3/4 miles southwest of the Watkins lease, could influence sub-surface formation pressures, and could increase the pressure in the Dutcher formation in the west end of the Watkins lease.

(ii) That immediately west of the Watkins lease was a 200 acre tract with 18 producing wells which produced $7,000,000 of oil from the Dutcher formation in two years, and that after such production that tract and the 18 wells were sold to Gulf Oil Company for $7,500,000.

(iii) That in 1978 a well was drilled northwest of the northwest corner of the Watkins tract, and that such well produced at a rate of 1800 barrels of oil per day during its first 24 hours of production.

(iv) That in 1978 another well was drilled 1000' to 1500' from the Watkins tract, which produced at a rate of 1200 barrels of oil per day during its first 24 hours of production.

(v) That in 1978 two wells were drilled north and northwest of the Watkins tract, and that each well produced at a rate of 750 barrels of oil per day during its first 24 hours of production.

(vi) That the Snow #1 well northwest of the Watkins tract had been drilled as a discovery well and that such well produced at a rate of 1800 barrels of oil per day during its initial 24 hours of production.

(viii) That the Gulf Oil Company water-flood project was apparently applying sub-surface mechanical pressure to certain producing zones of the Gulf property offsetting the Watkins lease; and that the entire field average for the Gulf lease offsetting the Watkins lease was 26 to 32 barrels of oil per day, per well.

(ix) That another, older and presently inactive Gulf Oil Company water-flood project, south of the Clark leases, was continued for the period of time from 1945 through 1958, and was plugged out under pressure; that the Clark leases were "on the structure" with the old water-flood area; and thus, that wells on the Clark lease might have some pressurization influence by reason of the water-flood project.

In all other respects, the allegations of Paragraph IV(36)(p) are denied.

(q) As to Paragraph IV(36)(q), PFAC, it is asserted that Pinter provided M. Dahl with logs from various drilling projects which themselves indicated oil bearing sand formations surrounding the Watkins and Clark leases, and linked histories of oil and gas production as established by driller's logs, only as set forth in such driller's logs. In all other aspects, the allegations of Paragraph IV(36)(q) are denied.

(r) As to Paragraph IV(36)(r), PFAC, it is asserted that Pinter provided M. Dahl with logs from various drilling projects which themselves indicated oil bearing sand formations surrounding the Doss and Antwine leases, and linked histories of oil and gas production as established by driller's logs, only as set forth in such driller's logs. In all other aspects, the allegations of Paragraph IV(36)(r) are denied.

(s) As to Paragraph IV(36)(s), PFAC, it is asserted that Pinter represented to M. Dahl that in 1980 he had drilled two successful wells upon the Doss leases and that these wells "potentialled" for 32.0 barrels of oil per day and 16 barrels of water per day, and 38 barrels of oil per day and 12 barrels of water per day, respectively. In all other respects, the allegations of Paragraph IV(36)(s) are denied.

(t) As to Paragraph IV(36)(t), PFAC, it is asserted that Pinter represented to M. Dahl that the two previously drilled Doss wells contained several pay zones or oil bearing sand formations having production potential. In all other respects, the allegations of Paragraph IV(10)(t) are denied.

(u) As to Paragraph IV(36)(u), PFAC, it is asserted that Pinter represented that two wells drilled on the Doss lease are in a field with a potential production life of 15 to 25 years, and that each could possibly produce as much as 15 to 20 barrels of oil per day, based on settled production. In all other respects, the allegations of the remainder of Paragraph IV(36)(u) are denied.

(v) As to Paragraph IV(36)(v), PFAC, it is admitted that Pinter represented that the participants in the Doss 3-B well would be joint tenants in common with Black Gold Oil Company, rather than partners. The remaining allegations contained therein are denied in their entirety.

(w) As to Paragraph IV(36)(w), PFAC, it is asserted that Pinter represented to M. Dahl that the Antwine and Doss ventures could contain as many as eight wells, based on drainage, and that Pinter represented to M. Dahl that such wells should be tested one at a time. In all other respects, the allegations of Paragraph IV(36)(w) are denied.

(x) As to Paragraph IV(36)(x), PFAC, it is asserted that Pinter represented to M. Dahl that the Doss tract had the best drilling merit of any lease he had evaluated in the past twenty years. In all other respects, the allegations of Paragraph IV(36)(x) are denied.

(y) As to Paragraph IV(36)(y), PFAC, it is admitted that Pinter represented to M. Dahl that the Doss lease tract

conformed to AAAA classification as a drilling prospect. In all other respects, the allegations of Paragraph IV(36)(y) are denied.

(z) As To Paragraph IV(36)(z), PFAC, the allegations contained therein are denied in their entirety.

(aa) As to Paragraph IV(36)(aa), PFAC, the allegations contained therein are denied in their entirety.

(bb) As to Paragraph IV(36)(bb), PFAC, the allegations contained therein are denied in their entirety.

(cc) As to Paragraph IV(36)(cc), PFAC, it is asserted that Pinter represented to M. Dahl that some Wilcox zone wells have had 40 to 60 years production life histories. In all other respects, the allegations of Paragraph IV(36)(cc) are denied.

(dd) As to Paragraph IV(36)(dd), PFAC, the allegations contained therein are denied in their entirety.

(ee) As to Paragraph IV(36)(ee), PFAC, the allegations contained therein are denied in their entirety.

(ff) As to Paragraph IV(36)(ff), PFAC, the allegations contained there are denied in their entirety.

37. As to Paragraph IV(37), PFAC, it is denied that Pinter, Black Gold, or any of the Defendants omitted or cause to be unstated, any material facts, or engage in any conduct or communication which had the effect of making other representations misleading in the light of the circumstances under which made. It is further denied that the Defendants had any duty to disclose the information contained in Paragraph IV(37), PFAC, either to M. Dahl or the remaining Plaintiffs, and denied that Defendants chose or intended to remain silent and thereby cause injury to the Plaintiffs. It is denied that Defendants engaged in any conduct intended to cause the Plaintiffs be lulled into a false sense of security as to their investments or potential investments, denied that any omissions, either singularly or in combination with one another, or in combination with statements made by Pinter, constituted real and knowledgeable deception by the Defendants. Defendants are without sufficient information

from which to form a response as to any conduct of the purported agents of Pinter to the extent that such agents are not identified. With regard to the specific allegations contained in Paragraph IV(37):

(a) As to Paragraph IV(37)(a), PFAC, it is denied that Defendants failed and omitted to state that Defendants' staff and personnel consisted primarily of Pinter's family, and that Pinter was the primary decision maker as to major decisions. It is denied that Pinter was the sole decision maker for the Defendant business, and asserted that M. Dahl was fully aware of the nature of Defendant Pinter's business, that Pinter's business was a family operation, and that he relied upon his wife and children for substantive input from time to time. In all other respects, the allegations of Paragraph IV(27)(a) are denied.

(b) As to Paragraph IV(37)(b), PFAC, the allegations contained therein are denied in their entirety.

(c) As to Paragraph IV(37)(c), PFAC, it is denied that Pinter failed to disclose to M. Dahl that funds would not be set aside in a segregated or escrow account; denied that Pinter was responsible to disclose this fact to the remaining Plaintiffs; denied that any harm resulted to any Plaintiff as a result of the method of accounting used by the Defendants; and denied that any funds paid by Plaintiffs to the Defendants were ultimately diverted for purposes other than drilling, testing, completing and equipping wells in which Plaintiffs had acquired any interest, except with regard to the credits and commission fee demanded by and paid to the Plaintiff, M. Dahl, in the approximate total amount of $38,000. In all other respects, the allegations of Paragraph IV(37)(c) are denied.

(d) As to Paragraph IV(37)(d), PFAC, it is denied that Defendants failed to inform M. Dahl that there were substantial number of dry and/or abandoned wells in the area in which the proposed drilling was to be effectuate on behalf of the Plaintiff and it is asserted that the Defendants gave M. Dahl copies of well reports which spccifically pointed out the exact location of every dry hole in the area

prior to the purchase of any interest by any Plaintiff, which reports M. Dahl specifically agreed to distribute and explain to the remaining Plaintiffs. In all other respects, the allegations of Paragraph IV(37)(d) are denied.

(e) As to Paragraph IV(37)(e), PFAC, it is denied that any firm projections of oil recovery or income from wells on the involved leases were ever made to the Plaintiffs by the Defendants; denied that the possibility of oil recovery and income could not be substantiated or supported by the production history and geology in the areas surrounding the leases; and denied that any omission concerning same occurred. In all other respects, the allegations of Paragraph IV(37)(e) are denied.

(f) As to Paragraph IV(37)(f), PFAC, it is denied that the results of other wells drilled by the Defendants in the same areas as those to be drilled on behalf of the Plaintiffs were indicative that commercial production in that area would be unlikely; denied that such results indicated that the likelihood of production of the new wells was poor; and denied that the Defendants represented that any certain volume of production would be obtained. In all other respects, the allegations of Paragraph IV(37)(f) are denied.

(g) As to Paragraph IV(37)(g), PFAC, the prolix language is not susceptible to any reasonable interpretation and is therefore wholly denied.

(h) As to Paragraph IV(37)(h), PFAC, it is denied that M. Dahl was not aware that Pinter had a "carried interest" in the wells, i.e., that no portion of the cost of drilling and/or completion are born by the Defendants absent a cost overrun; and further denied that any omission occurred regarding same. The assertion of the extreme unlikelihood of a cost overrun due to inflated estimation of the cost of drilling is denied. It is denied that the Defendants engage in any omission concerning the possibility or probability of completion costs, costs overruns, or the bearing of costs by the various parties to a given drilling program. The existence of a substantial built-in profit under the "turnkey"

agreement between Plaintiffs and Defendants is denied. In all other respects, the allegations of Paragraph IV(37)(h) are denied.

(i) As to Paragraph IV(37)(i), PFAC, the allegation of an omission by the Defendants to the Plaintiffs concerning same is denied.

(j) As to Paragraph IV(37)(j), PFAC, it is denied that initial or potential production tests of wells are historically insignificant; denied that such tests are useless in predicting prospective production; denied that such tests are indicative of and equal or equivalent amount of production after initial production tests have been performed; and denied that any omission occurred with regard to such information. In all other respects, the allegations of Paragraph IV(37)(j) are denied.

(k) As to Paragraph IV(37)(k), PFAC, it is denied that any omission occurred with respect to the allegations found therein. In all other respects, the allegations of Paragraph IV(37)(k) are denied.

(l) As to Paragraph IV(37)(l), PFAC, it is denied that any omission occurred with regard to the historical, actual, daily and cumulative production from wells in the area. In all other respects, the allegations of Paragraph IV(37)(l) are denied.

(m) As to Paragraph IV(37)(m), PFAC, the allegations contained therein are denied in their entirety.

(n) As to Paragraph IV(37)(n), PFAC, the allegations contained therein are denied in their entirety.

(o) As to Paragraph IV(37)(o), PFAC, the allegations contained therein are denied in their entirety.

(p) As to Paragraph IV(37)(p), PFAC, the allegations contained therein are denied in their entirety.

(q) As to Paragraph IV(37)(q), PFAC, the allegations contained therein are denied in their entirety.

(r) As to Paragraph IV(37)(r), PFAC, the allegations contained therein are denied in their entirety.

(s) As to Paragraph IV(37)(s), PFAC, the allegations contained therein are denied in their entirety.

(t) As to Paragraph IV(37)(t), PFAC, the allegations contained therein are denied in their entirety.

(u) As to Paragraph IV(37)(u), PFAC, the allegations contained therein are denied in their entirety.

(v) As to Paragraph IV(37)(v), PFAC, the allegations contained therein are denied in their entirety.

(w) As to Paragraph IV(37)(w), PFAC, the allegations contained therein are denied in their entirety.

(x) As to Paragraph IV(37)(x), PFAC, the allegations contained therein are denied in their entirety.

(y) As to Paragraph IV(37)(y), PFAC, the allegations contained therein are denied in their entirety.

(z) As to Paragraph IV(37)(z), PFAC, the allegations contained therein are denied in their entirety.

(aa) As to Paragraph IV(37)(aa), PFAC, the allegations contained therein are denied in their entirety.

(bb) As to Paragraph IV(37)(bb), PFAC, the allegations contained therein are denied in their entirety.

(cc) As to Paragraph IV(37)(cc), PFAC, the allegations contained therein are denied in their entirety.

38. As to Paragraph IV(38), PFAC:

(a) As to Paragraph IV(38)(a), PFAC, the allegations contained therein are denied in their entirety.

(b) As to Paragraph IV(38)(b), PFAC, the allegations contained therein are denied in their entirety.

(c) As to Paragraph IV(38)(c), PFAC, the representation are admitted, but the allegations concerning deceptive acts, practices and courses of business are denied in their entirety.

(d) As to Paragraph IV(38)(d), PFAC, the allegations contained therein are denied in their entirety.

(e) As to Paragraph IV(38)(e), PFAC, the allegations contained therein are denied in their entirety.

(f) As to Paragraph IV(38)(f), PFAC, the allegations contained therein are denied in their entirety.

(g) As to Paragraph IV(38)(g), PFAC, the allegations contained therein are denied in their entirety.

39. As to Paragraph IV(39), PFAC, the allegations contained therein are denied in their entirety.

FAILURE TO STATE A CLAIM FOR RELIEF

V.

Cause of Action No. One
Manipulative and Deceptive Devices and Contrivances in Violation of Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, 15 U.S.C. Section 78j(b)

As to the allegations of Paragraph V, PFAC, the Plaintiffs have failed to state a claim upon which relief can be granted.

VI.

Cause of Action No. Two
Fraudulent Sale of Securities in Violation of Section 33A(2), Texas Securities Act

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As to the allegations of Paragraph VI, PFAC, the Plaintiffs have failed to state a claim upon which relief can be granted.

VII.

Cause of Action No. Three
Fraudulent Sale of Securities in Violation of Section 25401, California Corporate Securities Act of 1968

As to the allegations of Paragraph VII, PFAC, the Plaintiffs have failed to state a claim upon which relief can be granted.

VIII.

Cause of Action No. Four
Misrepresentations and Omissions of Material Facts by Means of Prospectus or Oral Communications in Violation of Section 12(2), Securities Act of 1933, 15 U.S.C. 771(2)

As to the allegations of Paragraph VIII, PFAC, the Plaintiffs have failed to state a claim upon which relief can be granted.

IX.

Cause of Action No. Five
Sale of Unregistered Securities in Violation of Section 33A(l) of the Securities Act of the State of Texas

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As to the allegations of Paragraph IX, PFAC, the Plaintiffs have failed to state a claim upon which relief can be granted.

X.

Cause of Action No. Six
Sale of Unregistered Securities in Violation of Section 25110 of the California Corporate Securities Act of 1968

As to the allegations of Paragraph X, PFAC, the Plaintiffs have failed to state a claim upon which relief can be granted.

XI.

Cause of Action No. Seven
Sale of Unregistered Securities in Violation of Section 5 of the Securities Act of 1933, 15 U.S.C. Section 77e

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As to the allegations of Paragraph XI, PFAC, the Plaintiffs have failed to state a claim upon which relief can be granted.

XII.

Cause of Action No. Eight #Voidability of Contracts Pursuant to Section 29(b), Securities Exchange Act of 1934, 15 U.S.C. 78 cc(b)

As to the allegations of Paragraph XII, PFAC, the Plaintiffs have failed to state a claim upon which relief can be granted.

XIII.

Cause of Action No. Nine Punitive and Exemplary Damages Article 4004, V.A.T.S.

As to the allegations of Paragraph XIII, PFAC, the Plaintiffs have failed to state a claim upon which relief can be granted.

XIV.

DEFENSES

First Defense

1. *Illegality.* The Defendants are not liable to the Plaintiffs under the various causes of action set forth in PFAC because the defendants were induced to engage in the conduct therein alleged by the fraudulent conduct of the Plaintiff, M. Dahl, all as set forth in Defendants' Counter-Claim herein below, which is incorporated by reference herein.

Second Defense

2. *Estoppel.* The Plaintiffs are legally and equitably estopped form seeking to enforce the cause of action alleged in PFAC because the securities they received were sold, and their delivery effectuate, by fraudulent misrepresentations, concealment and willful nondisclosure on the part of the Plaintiff, M. Dahl, all as more particularly set forth in Defendants' Counter-Claim herein below, which is incorporated by reference herein.

Third Defense

3. *Contributory Fault.* The Plaintiffs right to recover under the causes of action set forth in PFAC are barred by the doctrine of contributory fault.

Fourth Defense

4. *Failure to Exercise Due Diligence.* The causes of action set forth in PFAC are barred by the Plaintiffs' failure to exercise due diligence in discovering the true facts and circumstances concerning the drilling ventures and securities about which they complain.

Fifth Defense

5. *In Pari Delicto.* The Plaintiff, M. Dahl, engaged in fraudulent misrepresentations to Pinter and the other Plaintiffs, all as set forth in the Defendant's Counterclaim. He is therefore barred from recovery for the causes of action set forth in PFAC, by reason of his conduct *in pari delicto* in connection with the offer, sale and delivery of the securities of that which he complains.

Sixth Defense

6. *Plaintiff Action as Principal.* The Plaintiff, M. Dahl, is barred from recovery for the causes of action asserted in PFAC, by reason of his conduct as a principal in connection with the offer, sale and delivery of the securities about which he complains.

Seventh Defense

7. *Ratification.* Recovery under each of the causes of action asserted by the Plaintiffs in PFAC is barred by the fact that each of the Plaintiffs knew, or reasonably should have known, of the high-risk nature of the drilling projects about which they complain, and knowing the true facts, acted thereafter in such a manner to ratify the agreements they now seek to rescind.

Eighth Defense

8. *Absence of Reliance.* The request for recovery asserted by the Plaintiff, M. Dahl, in PFAC, are barred by reason of

his failure to rely upon any of the alleged misrepresentations set forth in the Plaintiffs' First Amended Complaint.

Ninth Defense

9. *Aiding and Abetting.* The right of the Plaintiff, M. Dahl, to recover under the various causes of action set forth in PFAC, which are elsewhere vigorously denied, is barred, by reason of his knowing and affirmative aiding and abetting of any violation which did occur.

Tenth Defense

10. *Laches.* Recovery for the causes of action asserted by the Plaintiffs herein is barred by the doctrine of laches.

Eleventh Defense

11. *Mitigation of Damages.* To the extent that recovery may be allowed under any theory herein, which is elsewhere vigorously denied, the Defendants would assert that under the doctrine of mitigation of damages, Plaintiffs should be disallowed for all or a substantial portion of their alleged damages.

Twelfth Defense

12. *Good Faith Errors.* To the extent that the Defendants unknowingly engaged in any act of misrepresentation, concealment or non-disclosure, as is elsewhere vigorously denied, the Plaintiffs would be denied recovery therefore, by reason of the fact that such conduct was committed in good faith and in spite of reasonable and prudent care on the part of the Defendants.

Thirteenth Defense

13. *Waiver.* The Plaintiff, M. Dahl, is barred from recovery for the various causes of action asserted in PFAC by reason of his conduct inconsistent with such demands, under the doctrine of waiver, all as set forth herein more fully in Defendants' Counter-Claim, which is incorporated herein by reference.

Fourteenth Defense

14. *Controlling Person.* The Plaintiff, M. Dahl, is barred from recovery herein by reason of his conduct as a "controlling person" with regard to the offer, sale, issuance and delivery of securities complained of herein, all is more particularly set forth in 15 U.S.C.A. § 78t (1981).

Fifteenth Defense

15. *Reliance.* The Plaintiff, M. Dahl, had personal knowledge of the true facts and circumstances concerning the securities of which he complains, and acted as the agent and representative of the remaining Plaintiffs in authorizing their involvement. All Plaintiffs are therefore barred from recovery by reason of Dahl's failure to exercise reasonable diligence in connection with the sale of the referenced securities.

XV.

DEFENDANTS' COUNTERCLAIM

The Defendants adopt the assertions, admissions and denials set forth in the "Denials and Admissions" portion of its reply to PFAC which are incorporated herein by reference. For its counterclaim against the Plaintiff, Maurice Dahl, the Defendants, BILLY J. "B.J." PINTER, BLACK GOLD OIL COMPANY, PINTER ENERGY COMPANY, and PINTER OIL COMPANY, allege and say:

COUNT ONE

(*Commonlaw fraud* — affirmative misrepresentations inducing Defendants to transfer securities to M. Dahl and the remaining Plaintiffs.)

1. At all material times herein, the Plaintiff, M. Dahl, held himself out to be an experienced oil and gas investor, driller and operator doing business in Texas, Pennsylvania and elsewhere as "Puma Petroleum," a purported "offshore corporation." At all material times, Puma Petroleum (hereinafter, "Puma"), and Wrangler Oil Company

(hereinafter, "Wrangler"), were the alteregos of M. Dahl, being merely sham corporations or entities with no separate identity from M. Dahl. At all material times, M. Dahl was president, manager, owner, sole board member and chief executive officer of Puma, his purported corporation. Prior the entering into a joint business venture with Pinter, the Plaintiff, M. Dahl, specifically held himself out to Pinter as an experienced oil and gas operator and investor who had a number of friends and business associates who were knowledgeable and sophisticated investors in oil and gas leasing, drilling and operating ventures and who were eager to invest substantial monies for that purpose with M. Dahl. Prior to the actions complained of by the Plaintiffs herein, the Plaintiff, M. Dahl, sought and obtained Pinter's advice on oil drilling, operational problems and the purchased of oil and gas production, which advice was provided to Dahl by Pinter upon request and without charge. At all material times, it was the Plaintiff, M. Dahl, rather than the Defendant, B.J. Pinter, who eagerly sought the opportunity to bring the two together for drilling and production purposes. Furthermore, at all material times it was the Plaintiff, M. Dal, rather than the Defendant, B.J. Pinter, who initiated various discussions of joint ventures, purchase of leases, drilling, and solicitation of outside investors for the purpose of raising drilling capital.

2. Prior to the drilling of the Emmanuel Clark, Walter Clark and F.B. Watkins lease tracts, M. Dahl contacted Pinter and requested that he attempt to locate oil and gas leasehold properties in Oklahoma, and preferably in and around Okmulgee County, Oklahoma, which M. Dahl wished to acquire, either individually or jointly, with and through Pinter. As a result of this request, which was made verbally to Pinter by M. Dahl during a meeting in the middle of November, 1980, at the Denny's Restaurant at the corner of Jim Miller and Hwy. I-30 in Dallas, Texas, Pinter began efforts to acquire such an interest. He subsequently learned that the current Watkins and Clark leases would soon expire. He subsequently informed M. Dahl by telephone that these properties were available and that they

had excellent merit as drilling prospects. Thereafter, M. Dahl encouraged Pinter to obtain such properties as quickly and reasonably as possible.

3. As a result of Dahl's encouragement Pinter obtained a lease on the Watkins and Clark properties. Again at Dahl's insistence, he subsequently sought and obtained the additional leasehold properties commonly known as the Doss and Antwine leases. In each case, Pinter's efforts were the result of the eager and insistent prodding of the Plaintiff, M. Dahl. Each of the leasehold tracts was purchased because, in Pinter's opinion, it appeared to have merit as an exploratory project, either through initial drilling or reworking. The properties were not obtained as a "program" and were each to be developed only on a "one at a time," progressive basis.

4. As to the other Plaintiffs, the Plaintiff, M. Dahl, initially at a meeting at Northpark Tower or Denny's Restaurant in Dallas, Texas and on numerous occasions thereafter, informed Pinter that he had a number of friends and business associates who were sophisticated investors in the oil and gas business and who were also extremely eager to invest money with M. Dahl in any propsect which he would endorse. As M. Dahl's insistence, Pinter agreed to operate the funding of the Clark, Watkins, Doss and Antwine leases on a joint venture basis,k with M. Dahl being granted a right to sell interests in such ventures to a small number of his knowledgeable friends and business associates. He was allowed to do so by Pinter because of the following fraudulent misrepresentations of material fact, acts of concealment and non-disclosure, and fraudulent course of deceptive and unconscionable conduct.

5. *Affirmative Misrepresentations.* On or about November 15, 1980 at the Denny's Restaurant at the corner of Jim Miller and Hwy. I-30 or in the Puma Petroleum office located at the Northpark Tower, both of which locations are situated in Dallas County, Texas, the Plaintiff and Counter-Defendant, M. Dahl, made the following affirmative misrepresentations of material fact, in order to induce the

Defendant and Counter-Plaintiff, B.J. Pinter, to allow M. Dahl to raise a portion of the capital needed in order to drill the Watkins, Clark, Doss and Antwine leasehold prospect:

(a) That he was an experienced oil man, operating two separate oil; companies, Puma Petroleum and Wrangler Oil.

(b) That Wrangler was an "offshore corporation" and that M. Dahl wished to channel various expenses and profits through each of his two business entities depending on tax considerations.

(c) That M. Dahl had a number of sophisticated and knowledgeable oil and gas investors friends and business associates who were eager to invest substantial amounts of money through Dahl.

(d) That these investors had sufficient expertise to independently evaluate any drilling and leasehold prospects, and that Dahl would provide them with the facts upon which to make such an analysis.

(e) That M. Dahl would keep additional investors up to date with reports of business activities from the field. In other words, it was the working understanding between M. Dahl and Pinter that Pinter was only an "operator," i.e., the man who was doing the drilling, testing, completion, leasing, geological research and the like, and that M. Dahl would raise the money, i.e., would undertake the affirmative actions necessary to find a few sophisticated investors, to represent the true facts concerning the prospects and the risks involved therewith, to maintain satisfactory communication and to inform the investors of the status of the various wells, including drilling progress, completion progress, expenses and the like.

(f) That M. Dahl would continue to supply the investors with the information he received from Pinter in good faith.

6. Each of the above misrepresentations was false. The Plaintiff, M. Dahl, made such misrepresentations with knowledge of the true facts, with knowledge that Pinter did not know the true facts, and with the intention that such

misrepresentations be relied upon by Pinter. Pinter did in fact rely upon them, and was induced to act to his financial detriment thereby. Based upon these false assertions of fact by M. Dahl, Pinter was induced to offer, sell and transfer the securities complained of by Dahl, to enter into a purported joint venture with Puma Petroleum, to allow M. Dahl to offer, sell and deliver securities to the other Plaintiffs, to receive the funds issued by all Plaintiffs, and to pay the Plaintiffs and Counter-Defendant, M. Dahl, approximately $38,000.00 in sales commissions as a result of the transfer of such securities. As a proximate result, the Defendants and Counter-Plaintiffs have been damaged in the amount of One Million Dollars, including the loss of payments due from the Plaintiffs under their responsibility to issue same as working interest holders, the loss of revenue from the sale of oil and gas which could otherwise have been obtained, the harm suffered to Pinter's credit rating, business and financial reputation, leverage in borrowing capacity, ability to make use of discounts for materials used in the oil and gas drilling business, loss of time, loss of money and the use of money, physical discomfort, inconvenience and mental anguish.

7. The Plaintiff and Counter-Defendant, M. Dahl, acted willfully and maliciously in making the above referenced misrepresentations of fact and engaging in the above reference fraudulent plan, scheme and course of conduct. In fact, the Plaintiff and Counter-Defendant, M. Dahl, entered into each of the joint ventures engaged in with the Defendant and Counter-Plaintiff, B.J. Pinter, knowing that a substantial risk of nonprofit or delayed profits existed, as it always exists in the drilling business. In fact, the Plaintiff and Counter-Defendant, M. Dahl, entered into these joint ventures, and engaged in the above referenced fraudulent conduct, knowing that should the wells not "pay out" in accordance with his hopes, and at a rapid rate, he would simply turn around and allege misrepresentations under the securities Act, as he has in fact done. Accordingly, Pinter is entitled to recover exemplary damages against the Plaintiff, M. Dahl, in the amount of at lease Five Million Dollars.

COUNT TWO

(*Commonlaw fraud* — concealment and willful non-disclosure of facts known to M. Dahl and inducing Pinter to engage in joint venture and sale of securities.)

8. The Defendants re-allege Paragraphs 1-7.

9. After learning that the wells would not pay out as rapidly as he had hoped, and in furtherance of his fraudulent plan, scheme and course of conduct, M. Dahl willfully concealed and further failed to disclose material facts of which he knew Pinter to be unaware. M. Dahl fraudulently concealed and failed to disclose:

(a) His plan to "turn turnkey" and file a lawsuit in the event that the oil properties did not pay out in accordance with his unreasonable expectation;

(b) His fraudulent misrepresentations concerning the likelihood of recovery of oil and gas to the other Plaintiffs.

10. In furtherance of his fraudulent plan, scheme and course of conduct, M. Dahl made misrepresentations of material fact to the other Plaintiffs, including, but not limited to, each of the misrepresentations of material fact set out in PFAC, Paragraphs IV (19, 36, 37 and 38).

11. As a proximate result of such fraudulent concealment and acts of non-disclosure, the Defendants have been damaged in the amount of one million dollars, and are entitled to recover five million dollars in punitive damages.

COUNT THREE

(Violation of The Texas Deceptive Trade Practice Act.)

12. The Defendants re-allege Paragraphs 1-11. At all material times, Pinter was a consumer and M. Dahl was engaged in trade and commerce as those terms are defined in § 17.50 of the Texas Business and Commerce Code. Pinter sought and obtained services from the Plaintiff and Counter-Defendant, M. Dahl in exchange for credits toward

Dahl's interest in various oil and gas drilling ventures. In this connection, M. Dahl engaged in false, misleading and deceptive acts and practices, as prohibited by § 17.46(a) of the Texas Business and Commerce Code. As a proximate result, the Defendants have been adversely affected. The false, misleading and deceptive acts and practices of the Plaintiff, M. Dahl, upon which the Defendants relied to their detriment, include:

(a) Causing confusion on the part of the other Plaintiffs as to the source, sponsorship and approval of drilling services to be obtained by them;

(b) Representing that the services to be provided by Pinter had characteristics, ingredients, uses, benefits and quantities which they did not have;

(c) Representing that the service to be provided by Pinter would be of a particular standard, quality or grade when, in fact, they would be of another; i.e. representing that Pinter's efforts would be successful as more particularly set forth in the misrepresentations found in PFAC, Paragraphs IV (36-39), when in fact, such misrepresentations were far from the truth;

(d) Advertising Pinter's services with the intent not to sell them as advertised; i.e., indicating the various misrepresentations of fact found in PFAC, Paragraphs IV (29; 36-39), when M. Dahl knew these representations to be untrue;

(e) Representing that the securities complained of conferred and involved rights, remedies and obligations which they did not have; i.e., representing that the prospects or likelihood or recovery were at substantially as set forth in PFAC, Paragraphs IV (36039), when in fact this was not the case; and that if no recovery of oil or gas could be obtained initially, no additional money would need be paid by the investors as expenses.

13. The acts and practices engaged in by the Plaintiff, M. Dahl, as set froth above, constituted unconscionable course of conduct under § 17.50(a)(3) of the Act. M. Dahl is there-

fore liable to the Defendants for actual damages, or one million dollars, plus three times such actual damages, costs and reasonable attorneys fees incurred with this action.

COUNT FOUR

(*Willful Breach of Contract* — The Plaintiffs, have willfully breached their contractual obligations to the Defendants in connection with the securities about which they complain, causing consequential damages in the amount of One Million Dollars. The Defendants and Counter-Claimants are therefore entitled to receive from the Plaintiffs, jointly and severally, One Million Dollars in consequential damages, exemplary damages in the amount of Five Million Dollars, court costs and attorneys fees.

WHEREFORE, PREMISES CONSIDERED, the Defendants pray that the Plaintiffs recover nothing but by way of their First Amended Petition and that the Defendants and Counter-Claimants recover their actual damages, exemplary damages and attorney fees as alleged herein, that they be awarded pre and post judgment interest at the highest lawful rate for costs, and for such other and further relief as to which they may show themselves justly entitled.

* * * * *

ANSWER OF MAURICE DAHL TO COUNTERCLAIM OF DEFENDANTS

Filed December 22, 1983

[Caption Omitted in Printing]

Subject to Maurice Dahl's Motion For More Definite Statement and/or To Dismiss, filed concurrently with this Answer, Maurice Dahl herein Answers the Counterclaim of Defendants B.J. Pinter, Black Gold Oil Company, Pinter Energy Company and Pinter Oil Company, as follows:

A. COUNT ONE — COMMON LAW FRAUD
(Affirmative Misrepresentations Inducing Defendants To Transfer Securities To all Plaintiffs, Except M. Dahl.)

1. M. Dahl asserts that Count One of Defendant's Counterclaim fails to state a claim against M. Dahl upon which relief can be granted.

2. M. Dahl responds to the allegations of Count One of Defendants' Counterclaim as follows:

a. M. Dahl admits the allegations of paragraph 1 of Count One to the effect that at all material times M. Dahl was the sole owner, president and director of Puma Petroleum Corporation. All of the remaining allegations of said paragraph are denied.

b. M. Dahl admits the allegations of paragraph 2 of Count One to the effect that M. Dahl asked B.J. Pinter to locate good oil and gas leases for Maurice Dahl. All of the remaining allegations of said paragraph are denied.

c. The allegations of paragraph 3 of Count One are denied in their entirety.

d. The allegations of paragraph 4 of Count One are denied in their entirety.

e. The allegations of paragraph 5 of Count One are denied save and execpt as to subparagraph (f) of paragraph 5, M. Dahl admits he agreed, in good faith, to supply the investors with the information he received from Pinter. M. Dahl avers he has so done.

f. The allegations of paragraph 6 of Count One are denied in their entirety.

g. The allegations of paragraph 7 of Count One are denied in their entirety.

B. COUNT TWO — COMMON LAW FRAUD
(Wrongful Inducement of Pinter to Engage in Joint Venture and Sell Securities)

3. Count Two of Defendant's Counterclaim fails to state a claim against M. Dahl upon which relief can be granted.

4. M. Dahl herein incorporates his above responses to paragraphs 1-7 of Defendants' Counterclaim.

5. M. Dahl denies the allegations of paragraph 9(a) of Count Two in its entirety.

6. M. Dahl is unable to admit or deny the allegations of paragraph 9(b) for the reason that it does not give sufficient detail to enable M. Dahl to prepare a response, other than that M. Dahl denies he knowingly made any fraudulent misrepresentation.

7. M. Dahl is unable to admit or deny the allegations of paragraph 10 for the reason that such allegations do not give sufficient detail to enable M. Dahl to prepare a response.

8. M. Dahl denies the allegations of paragraph 11.

C. COUNT THREE — VIOLATION OF TEXAS DECEPTIVE TRADE PRACTICE ACT

9. Count Three of Defendants' Counterclaim fails to state a claim against M. Dahl upon which relief can be granted.

10. M. Dahl denies the allegations of paragraph 12 contained in Count Three in its entirety. As to each subparagraph of paragraph 12 contained in Count Three, M. Dahl responds as follows:

a. The allegations of subparagraph (a) are insufficient in detail to enable M. Dahl to prepare a response.

b. The allegations of subparagraph (b) are insufficient in detail to enable M. Dahl to prepare a response.

c. The allegations of subparagraph (c) are insufficient in detail to enable M. Dahl to prepare a response.

d. The allegations of subparagraph (d) are insufficient in detail to enable M. Dahl to prepare a response.

e. The allegations of subparagraph (e) are insufficient in detail to enable M. Dahl to prepare a response.

11. M. Dahl denies the allegations of paragraph 13 in its intirety.

D. COUNT FOUR — WILLFUL BREACH OF CONTRACT

12. Count Four of Defendant's Counterclaim fails to state a claim upon which relief can be granted.

13. The allegations of Count Four are insufficient in detail to permit a response to be properly made.

E. DEFENSE

14. M. Dahl asserts that if in fact he made any material misrepresentation to any of his Co-Plaintiffs, then such were made without knowledge of their falsity and were based upon information transmitted to M. Dahl by Defendant B.J. Pinter, upon which information M. Dahl was entitled to rely and in good faith did rely and, accordingly, Defendants are not entitled to any relief as they request against M. Dahl.

Subject to this Court's rulings as to Plaintiffs' Motion for More Definite Statement and/or To Dismiss, and subject to the Plaintiffs' right to re-plead as Counter-Defendants if such be necessary and upon a final hearing hereof, Plaintiff M. Dahl as Counter Defendant asks for judgment that the Defendants take nothing by Plaintiffs' counterclaim, and the Plaintiffs have judgment against said Defendants as asked in their Complaint.

* * * * *

DEFENDANTS' SECOND SUPPLEMENTAL ANSWER RAISING ADDITIONAL AFFIRMATIVE DEFENSE

Filed June 22, 1984

[Caption Omitted in Printing]

* * * * *

I.

Seventeenth Defense

Statutory Exemption. The Plaintiffs' claims are barred by reason of the fact that the offer, sale and delivery of each security to each Plaintiff herein constitute exempt transactions of securities.

II.

Eighteenth Defense

Public Policy. Enforcement of the Plaintiffs' claims under the California Blue Sky laws in contrary to the public policy of Texas, the forum state, and should therefore be denied.

* * * * *

SECOND AMENDED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF DEFENDANTS BILLY J. "B.J." PINTER, ET AL.

Filed July 27, 1984

[Caption Omitted in Printing]

* * * * *

Finding of Fact

1. The matter in controversy arises out of the issuance and sale of securities by Defendants to Plaintiffs.

2. Venue for this action is proper in view of the fact that certain of the Defendants reside in this district.

3. This action arises under the '33 and '34 Securities Acts, 15 U.S.C. § 77 *et seq.* and 15 U.S.C. § 78a, *et seq.*

4. Plaintiffs Maurice Dahl, et al, other than Grantham, are citizens of the State of California. Plaintiff Grantham is a citizen of the State of Texas.

5. Defendants B.J. Pinter, et al ("Pinter"), are all residents and citizens of the State of Texas.

6. *Maurice Dahl.* In the 1980-1981 time frame and prior to his purchase of the fractional undivided interest in oil and gas of which he complains, the Plaintiffs Maurice Dahl ("Dahl") was involved in real estate brokerage and investments in the state of California. He had a net worth in excess of $1,000,000.00 and an annual income of as much as $250,000.00. Dahl had invested in at least two "oil deals" prior to his involvement with the Defendants. In 1980 he formed two corporations, "Wrangler Oil Company" and "Puma Petroleum, Inc.," for "tax investment purposes" and to acquire and maintain oil and gas royalty and working interest. At some point prior to his involvement with Pinter, Dahl, by his own admission, was defrauded by an employee specifically hired by him for the purpose of locating "oil deals" in and around the Texas-Oklahoma oil patch. Dahl nevertheless continued his active search for oil and gas

properties. He hired one Dean Kirk for the purpose of locating and acquiring oil and gas deals. Through Puma Petroleum Dahl funded Kirk's rental of office space and other incidental expenditures in furtherance of these investment purposes for several months while Kirk actively searched for oil deals in Texas and Oklahoma in which Dahl could invest.

7. Dahl testified that Kirk introduced Dahl to Pinter and that, at least initially, Dahl learned most of the information he received regarding Pinter from Kirk. Kirk informed Dahl that Pinter was a highly regarded, thorough, capable, competent and successful oil and gas operator in the Texas, Oklahoma and Louisiana area.

8. *B. J. Pinter.* B. J. Pinter has been an independent oil and gas operator for thirty-five years. He was involved primarily in drilling wells in Texas and Oklahoma during the 1980-1981 time frame. He obtained the Okmulgee County leases which were subsequently fractionalized and sold to Dahl, Grantham and the California investors. Pinter had been drilling oil wells and studying the Okmulgee area for several years before drilling the wells in question. He is a registered securities dealer in Texas, having maintained a Texas State Securities Board License for Dealer in Oil and Gas for twenty years.

9. The Court finds, based upon the cross-examination testimony of Plaintiff M. Dahl that Dahl was a sophisticated oil and gas investor who was actively soliciting oil deals when he met Pinter. It was, in fact, Dahl who "solicited" Pinter, rather than Pinter who solicited Dahl's investment in the five Okmulgee County, Oklahoma wells ("the five wells"). Dahl made numerous trips to the Okmulgee County area to view the proposed well sites and the surrounding leases. He also directed Kirk to investigate the potential for recovery. Dahl and Pinter initially discussed doing the wells as a "joint venture." Because of his extensive investigation of the circumstances and further because of Pinter's willingness in providing Dahl with information, the Court finds that Dahl had disclosure or at least access to all of the

information requisite for a registration statement. Dahl purchased several of his interests in the name of "Maurice Dahl or assignee," *see* e.g., Defendant's Exhibit ____, advanced funds to Pinter to obtain a lease for one of the properties subsequently drilled on, solicited each of the California investors, collected most of their checks for drilling funds and hand-delivered them to Pinter, acting as an "issuer," "underwriter" and a "dealer" in each of the transactions complained of. 15 U.S.C. § 77b(11), (12)(4).

10. *The California Investors and Grantham.* As stated above, Plaintiff Dahl's conduct in actively promoting the purchase of securities by Grantham and the California investors classifies him as an "underwriter," a "dealer" and an "issuer" of the securities in question. Dahl's testimony establishes that after he decided to invest he "offered the opportunity [to invest] to my close personal friends" on the basis of his desire to "share his good fortune" with them. Since all other Plaintiffs but Wendy Grantham reside in California, the Plaintiffs will be referred to respectively as "Dahl," the "California investors" and "Grantham." Dahl testified that the California investors based their decision to invest in the securities upon Dahl's assurances to them that he "felt confident in" the subject investment and gave the project his "blessing", that he had investigated the matter carefully, had been to the property, had viewed it, and was investing. In addition he testified that the "sense," or state of mind, of these investors, "was that, 'if you are in it, we will get into it with you.' " Included in the California investors were Dahl's brother, Charles Dahl, and his tax accountant, Aaron Heller. Their relationship to Dahl was clearly one of trust and confidence in his abilities as a businessman and investment advisor.

11. Of the Plaintiffs, only Dahl and Grantham appeared at trial. Pinter testified that he was never in direct contact with any of the Plaintiffs except Dahl and Grantham, and this testimony was not controverted. Therefore, the record fails to show that Pinter made any representation, misrepresentation or omissions of material fact to any of the Plaintiffs other than Dahl or Grantham. Indeed, the statements

which form the basis of the pleadings as they relate to the California investors have not been traced to Pinter through the development of proof in this case, other than through the self-serving testimony of Dahl. The Court finds that Grantham and the California investors based their decisions to invest in the Black Gold Wells on what they heard from Dahl.

12. The Court further finds that the California investor plaintiffs have failed to meet their burden of proof with regard to their claims herein as a matter of law.

13. Plaintiff Wendy Grantham acquired her interests in the "Antwine 2-C" and "Doss 3-B" leases in reliance upon the fact that Dahl had purchased interests in these same leases. According to her own testimony, she invested because Dahl invested and despite his warnings to her.

14. The evidence is clear that Pinter never made any material misrepresentation to Dahl, Grantham or any other Plaintiffs with respect to the investment of funds in the oil and gas transaction complained of. Pinter also made no material omission of any fact or circumstance with respect to the solicitation of any Plaintiffs in any oil and gas transaction.

15. Dahl, the California Plaintiffs and Grantham have wholly failed to meet their burden of proof to establish that they relied or reasonably relied upon any alleged misrepresentation or omission by Pinter.

16. During 1981, each Plaintiff executed an agreement evidencing their acquisition of an undivided working interest in certain leases known as the "Antwine 2-C," "Doss 3-B," "Emanuel Clark 1-B," "F-B Watkins 1-A," and "Walter Clark 1-C" Wells.

17. Under the terms of the agreements in question the Plaintiffs were required to pay to the Defendants sums for completion of the wells and for other production related expenses as and when incurred.

18. Under the terms of the agreements the sum of $_____ remains due by Plaintiffs to Pinter that has not been paid, as follows:

19. The Court finds that the Plaintiffs, Maurice Dahl, interfered with the contractual rights of the Defendant in urging Grantham and the California investors to refuse to pay their proportionate share of the outstanding completion costs, as set forth in Paragraph 18 hereinabove. Therefore, Dahl is jointly and severally liable for the full amount of these costs.

20. The Court finds that Dahl willfully and maliciously interfered with the contractual rights as between Pinter and the California investors and awards punitive damages to them against Dahl in the amount of $_____.

Conclusions of Law

1. This Court has Federal question jurisdiction as to the claims of the Plaintiffs arising under the Securities Act of 1933 and the Securities Exchange Act of 1933 and pendent jurisdiction as to the remaining claims.

2. *Registration Provision of '33 Securities Act.* Section 12(1) makes unlawful the failure to register nonexempt securities with the Securities & Exchange Commission. 15 U.S.C. § 77e. However, the offer, sale and delivery of each security complained of herein took place more than one year prior to the filing of suit. Under the applicable one year limitation bar, the plaintiffs are not entitled to relief. 15 U.S.C. § 77m; *Mason v. Marshall,* 412 F. Supp. 294, 299 (D.C.N.D. Tex. 1974, *aff'd,* 531 F.2d 1274 (5th Cir. 1976).

3. The conduct in question constituted a private offering. 15 U.S.C. § 77d(2); *Doran v. Petroleum Management Corporation,* 545 F.2d 893 (5th Cir. [Texas] 1977). Dahl was primarily responsible for negotiating the terms of each investment on behalf of Grantham and the California investors. He received or collected most of the investment proceeds from them and hand delivered the funds to Pinter.

He had disclosure of or access to all of the information requisite to a registration statement. He acted as an "issuer" in the transactions complained of. The California investors and Grantham had reasonable access, through Dahl, to some information obtainable by Dahl, had they wished to review it. They chose, however, to follow Dahl's lead, by Dahl's own admission. There is ample evidence to establish the fact that because of the number of offerees, their relationship to each other and to Dahl, the number of units sold, the relatively small financial outlay of Grantham and the California investors and the manner of the offering, the relevant transactions come within the "Private Offering" exemption from registration found in § 4(2) of the '33 Act. 15 U.S.C. § 77d(2). *S.E.C. v. Raston Purina Co.,* 346 U.S. 119, 126 (1953), *Doran v. Petroleum Management Corp.,* 545 F.2d 893, 899-908 (1977); *Hill York Corp. v. American International Franchise, Inc.,* 448 F.2d 608 (5th Cir. 1975).

4. *Fraud in violation of art. 4004.* The plaintiffs' claims pursuant to art. 4004, Tex. Rev.'d Civ., Stat.s, Ann. must be denied. This statute was repealed in 1967. Acts 1967, 60th Leg., Vol. 2, p. 2619, Ch. 75, § 4, ff.

5. *Misleading statements.* Plaintiffs allege a right of recovery for numerous misrepresentations of material fact and acts of concealment under Rule 10b-5 and § 10(b) and 29(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 77a, ff), art. 581-33A(1) of the Texas Securities Act (Tex. Rev. Civ. Stat.s Ann., art. 581-1, et seq.), § 27.01 of the Texas Business and Commerce code and § 55401 of the California Securities Act (Cal Corp. Code § 55001, et seq.). These claims should also be denied.

The testimony of the Plaintiff, Maurice Dahl, establishes that he was engaged in the oil and gas business himself during the time frame in question, operating two oil companies for tax and royalty and working interest leasehold acquisition purposes and employing an agent to engage in the search for such properties on a full time basis. Dahl testified that he made numerous trips to Oklahoma both before and after he purchased his interest and invited his tax

accountant and other close personal friends to get involved because he had "investigated" the program carefully. The Plaintiff Grantham testified that she ignored the warnings of Dahl as to the high risk nature of the drilling ventures being offered. Dahl testified that the California investor plaintiffs were offered the "opportunity" to invest on the basis of Dahl's desire to "share his good fortune" with them and admitted that these investors based their decision to invest on his assurances to them that he felt confident in the project, and that having investigated it, he "gave it his blessing." He testified that the sense, or state of mind, of the California investors, was that if he (Dahl) was in the deal, they wanted to get into it with him. None of the California investors testified and the record is therefore silent as to the facts, circumstances or representations upon which they actually relied. Dahl's actions classify him as an "underwriter," a "dealer" and an "issuer." 15 U.S.C. § 77b(4, (11), (12); *S.E.C. v. Mono-Kearsarge Conso. Min. Co.,* 167 F. Supp. 248 (D.C. Utah 1958) ("underwriter"), *S.E.C. v. National Banker's Life Ins. Co.,* 334 F. Supp. 444 (D.C.N.D. Tex. 1971), *aff'd,* 447 F.2d 920 ("underwriter"); *U.S. v. Rachal,* 473 F.2d 1338 (C.A. Tex. 1973) ("issuer"); *Lynn v. Caraway,* 379 F.2d 943 (C.A. La. 1967), *cert. denied,* 369 U.S. 881. Had the California Plaintiffs presented a prima facie case under the § 12(1) claims, 15 U.S.C. § 77(1), Dahl would be liable.

Moreover, even if there had been full disclosure of all facts relating to the program, the Plaintiffs' investment decisions would have probably remained the same. Dahl was aware of the speculative nature of an oil and gas drilling venture and his decision to invest was made with knowledge of the need to investigate thoroughly. The evidence is not persuasive that, had the Defendants fully disclosed all of the facts that the Plaintiffs allege were not disclosed, such information would have caused the Plaintiffs not to invest. Under these facts the Plaintiffs have failed to meet their burden of establishing justifiable reliance. In fact, the evidence is not conducive of the conclusion that Pinter did not act with due diligence. Recovery under Section 10b-5 and

the Texas and California Blue Sky anti-fraud provisions, as well as Section 27.01, is therefore denied. See, *e.g., Mason, et al., v Marshall,* 412 F. Supp. 294, 301-02 (D.C.N.D. Tex. 1974), *aff'd.,* 531 F.2d 1274, 75 (1976).

6. *Texas Blue Sky registration violation.* Article 33A(1) of the Texas Securities Act makes liable any person who offers or sells an unregistered security. However, art. 581-5(I0(a) provided that the Act does not apply to any sale, offer for sale, solicitation, subscription, dealing in or delivery of any security where the sale is made without any public solicitation or advertisement and the total number of security holders of the issuer does not exceed thirty-five (35) persons after taking such sale into account. In the case at bar, Pinter testified that the total number of security holders in all *five* wells was under thirty-five. Plaintiffs were unable to disprove this testimony. The evidence also fails to establish the existence of a "public solicitation" or "advertisement." The term "advertisement," as used in subdivision I of the Act, implies public distribution., The use of a confidential memorandum identifying the well leases, drilling history of the area and proposed drilling site(s) does not constitute "advertisement" within the meaning of this subdivision. *Sibley v. Horn Advertising, Inc.,* 505 S.W.2d 417, 420 (Tex. Civ. App. — Dallas 1974), writ ref'd. n.r.e., *cert. denied,* 420 U.A. 929 (1976) (confidential memorandum presented in no more than twenty personal interviews with selected acquaintances of one of the promoters).

Finally, the plaintiffs' attempts to "integrate" the five wells with oil properties offered by Lindaire, a third party, were unsuccessful. Whiteside, the chief executive officer of Lindaire, testified that (1) the investors in the Lindaire wells were different entirely from the investors in the Pinter's well; (2) Lindaire did not solicit any of Pinter's investors in raising its drilling funds; (3) Pinter contracted to act solely as an "operator" on the Lindaire wells and had no other responsibility than drilling the Lindaire wells on a "turnkey" basis; (4) Pinter was not consulted in the compilation of the Lindaire offering circular; (5) Lindaire was solely responsible for raising the drilling funds for the

Lindaire wells; (6) Pinter had no right to exercise any financial authority over Lindaire, and vice versa; and (7) the Lindaire and Pinter well offerings were under separate financing plans, made at separate times to separate investors, and were for different wells on different leasehold tracts. Although one of the Lindaire wells was on the same mineral lease as the Pinter wells, Whiteside testified that the acreage Lindaire had acquired was a separate tract. *Securities & Exchange Commission, Murphy,* 626 F.2d 633 (C.A. Cal. 1980); *Bayoud v. Ballard,* 404 F. Supp. 417 (D.C. Tex. 1975).

7. *California Blue Sky Registration Violation.* The plaintiffs allege that they are entitled to rescission because the defendants failed to register the securities in question in accordance with the blanket registration requirements of the California Securities Act. § 25510, Cal. Corp. Code Ann. (Vernon 1968). However, under proper application of the choice-of-law rule this Court will refuse to apply the California statute because it is in direct conflict with the articulated policy of the State of Texas regarding oil and gas leasehold interests. *Gaillard v. Field,* 381 F.2d 25, 28-29 (10th Cir. 1967), *cert. denied,* 389 U.S. 1044.

In *Gaillard,* residents of California brought an action in federal court in Oklahoma against residents of Oklahoma to rescind sales of fractional undivided interests in oil and gas leases. The property was located in Oklahoma and three other states (none was in California). As here, the California residents contended that no permit had been obtained under the California statute. The district court applied a choice-of-laws test, refusing to enforce the California statute on the basis that it would render unenforceable contracts considered valid in Oklahoma and therefore thwart the clear public policy of that state. *Id.,* at 27.

The Tenth circuit, with Jones, J., Senior Judge of the Fifth Circuit, sitting by designation, affirmed. *Id.*

> We think the interests and policies of California and Oklahoma are antagonistic. California ... gives the buyer of such a security an option to void the sale if

> the seller has not registered with the state and received approval to sell, an option unknown to the common law. Oklahoma ... recognizes no buyer's option to register with the state and receive approval to sale.

Id., at 28. Noting that the California complaint sought a remedy from a federal court sitting in Oklahoma which that state did not even grant to its own residents, the Tenth circuit reasoned that Oklahoma had a clear interest in ascertaining that legitimate contracts made by its own residents would not be rendered void in Oklahoma courts by enforcing the law of a sister state, "whose statutes regard oil and gas transactions in an entirely different context than Oklahoma." *Id.* The court quoted Judge Cardozo's familiar statement in *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918), to the effect that the law of California requiring rescission of oil and gas interest must fail of enforcement because it violated a "deep-rooted tradition of the common weal" of the state of Oklahoma. *Id.*, at 29.

In Texas, as in Oklahoma, "[t]he policy ... is not passive, neutral, or unarticulated. The contrary with California law is expressed in clear statutory language." 381 F.2d at 27. While California registration requirements demand registration of each and every oil and gas interest offered or sold within that state, Texas specifically exempts such transactions from registration and from the application of mandatory rescission rules. Art. 581-5(i)(a), -5(Q), Tex. Rev. civ. Stat.s Ann. (Vernon 1983). Texas does not seek to apply the penalty of rescission for oil and gas leases which meet the requirements of these exemptive provisions. Regulation of oil and gas lease transactions emanating from Texas by applying the California rescission rule would therefore be directly violative of public policy of the forum state.

Here, as in *Gaillard*, the party injured by the application of the rule in question is a resident of the forum, state. Texas has an interest in that legitimate contracts made by its residents could be avoided by residents of other states by enforcing the California rescission rule. As in the case of

Oklahoma, Texas regards oil and gas interest in an entirely different context than California; to rescind all unregistered oil and gas interest would violate a deep rooted tradition of the common weal in Texas. This result should not attain., see also, 4 Loss, SECURITIES REGULATION (1969 SUPPLEMENT), p. 2251, ff. (1969). *Cf., Southern Surety Co. v. Illinois Powder Mfg. Co.*, 31 S.W. 2d 314, 316 (Tex. civ. App. — Galveston 1930), *Noted*, 9 Tex.L.Rev. 437 (1931) (Texas courts without jurisdiction to enforce foreign states' exclusive statutory remedy; 1 McDonald, [TEXAS CIVIL PRACTICE, § 1.08, § 1.07.6(vi), pp. 35, 36 (rev. 1981); 12 Tex.Jur. 3d CONFLICTS OF LAWS, § 3, 4, pp. 304-306 (1981) *Nowell v. Nowell*, 408 S.W.2d 550, 553 (Tex. Civ. App. — Dallas [Claude Williams, J.] 1966), writ dism'd w.o.j., *cert. denied*, 389 U.S. 847 (1968) (application of doctrine of comity is voluntary and not obligatory and rests in sound discretion of tribunal of forum).

8. The evidence fails to show that Pinter made any material misrepresentation or engaged in any act of omission or that any Plaintiff in this lawsuit reasonably relied on any misrepresentation or omission of any material fact with respect to the purchase of any security.

9. It is doubtful that the Plaintiffs would have changed their decision to purchase the securities they obtained regardless of the information made available to them. *Mason, et al., vs. Marshall*, 412 F. Supp. 294, 301-302 (D.C.N.D. Texas 1974), *aff'd*, 531 F.2d 1274, 75 (1976). Evidence of an offerree's sophistication is not required in all cases in order to establish a private offering exemption from registration requirements. Grantham was Dahl's "close personal friend" and his constant companion to the well sites. The California investors were also admittedly his "close personal friends" and were solicited by Dahl. They were also advised by Dahl, a sophisticated investor, and had access through him to the information that registration would disclose. *Woolf v. S.D. Cohn & Co.*, 515 F.2d 591, 611-612 at n.14 (5th Cir. 1975). *Doran vs. Petroleum Management Corporation*, 545 F.2d 893 (5th Cir. [Texas] 1977).

* * * * *

JUDGMENT

Filed October 3, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA -3-82-1867-G

MAURICE DAHL, *et al.*,
Plaintiffs
vs.
BILLY J. "B.J." PINTER, *et al.*,
Defendants

This cause was tried before the Court without a jury on May 21-24, June 22 and July 12, 1984, and the Court having heard the testimony and having examined the proof offered by the respective parties and having filed herein its findings of fact and conclusions of law and having directed that judgment be entered in accordance therewith and tender having been made by Plaintiffs in Paragraph XIV of their Complaint,

Now, therefore, by reason of the law and the findings in this case, it is

ORDER AND DECREED that each of the Plaintiffs have judgment against B.J. Pinter, individually and d/b/a/ Black Gold Oil Company, in the amount of their purchase price for the securities purchased, plus prejudgment interest thereon at the rate of 6% annum from the date of payment of their purchase price in May, 1981, less the amount of any income a Plaintiff received on the security, all as follows:

Plaintiff/Purchaser	Total Purchase Price	6% Pre-judgment Interest	Less (income received)	Total Judgment
Accra Tronic Seals Corp.	$ 7,480	$ 1,496	$ -0-	$ 8,976
Gary Clark	7,480	1,496	-0-	8,976
Robert Danielle	7,480	1,496	-0-	8,976
Charles Dahl	7,480	1,496	-0-	8,976
Dowayne C. Bockman	7,480	1,496	-0-	8,976
Ray Dilbeck	7,480	1,496	-0-	8,976
Richard Koon	7,480	1,496	-0-	8,976
Arthur Overgaard	7,480	1,496	-0-	8,976
Jack Yeager	7,480	1,496	-0-	8,976
Wendy Grantham	7,265	1,453	(2,186.77)	6,531.23
Aaron Heller	7,150	1,430	(4,373.55)	4,206.45
Maurice Dahl	310,725	62,145	(15,307.38)	357,562.62

FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs have postjudgment interest upon the judgment sums at the rate of 10% annum from date of entry hereof until paid.

FURTHER ORDERED, ADJUDGED AND DECREED that Defendants take nothing by their counterclaims against Plaintiffs herein and all parties shall bear their own costs of suit.

Entered this October 3, 1984

A. Joe Fish
United States District Judge

**APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF TEXAS**

Before BROWN, REAVLEY, and HILL, Circuit Judges.

J U D G E M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here orederd and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER OREDERD that defendants-appellants pay to plaintiffs-appellees the costs on appeal, to be taxed by the Clerk of this Court.

April 18, 1986

BROWN, Circuit Judge, dissenting.

ISSUED AS MANDATE: JUL 31 1985

Test
Clerk, U.S. Court of Appeals,
Fifth Circuit
By Sarah L. Holmes
Deputy
New Orleans, Louisiana
JUL 31 1986

OP-JDT-9C
Rev. 4/85

BLACK GOLD OIL COMPANY
Oil and Gas Development, Production and Operations
P.O. Box 18687, Dallas, Texas 75218, (214) 328-9661

AGREEMENT

ANTWINE LEASE TRACT
WELL NO. 2C

WILCOX SAND OIL AND/OR
GAS DRILLING PROSPECT
FORTY(40) ACRES, MORE OR LESS
OKMULGEE COUNTY, OKLAHOMA

THIS AGREEMENT is made this _____ day of _____, 1981, by and between Black Gold Oil Company of Dallas, Texas (Hereinafter referred to as "BLACK GOLD" and _____ whose address is _____ (Hereinafter referred to as "PARTICIPANT"); and whose social security number is _____.

WITNESSETH

WHEREAS the parties constitute a predetermined and limited group of sophisticated and knowledgeable well informed investors who desire to arrange for participation in an oil and/or gas drilling venture as an investment and do declare that it is not for the purpose of reselling their interest therein. (These participating interests are being sold without the benefit of registration under the Securities Act of 1933, as amended, and on reliance of rule 146 thereunder).

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS:

That BLACK GOLD is the owner of one certain oil and/or gas lease tract, known as "ANTWINE LEASE", covering the following described land:

The Northeast Quarter of the Northeast Quarter (NE/4 of NE/4) of Section 10, Township 14 North, Range 11 East, being located in Okmulgee County, Oklahoma. This lease tract is subject to and there is hereby reserved an undivided one-eighth of eight-eighths (1/8th. of 8/8ths.) overriding royalty of all oil, gas and casinghead gas produced and sold from said lease tract; and, said interest is held and owned to be free and clear of all development costs and operating expenses;

This lease tract being that which BLACK GOLD proposes to drill a well to known as ANTWINE NO. 2C in search of oil and/or gas to a depth of approximately twenty-eight hundred (2800) feet; it is understood that in the event BLACK GOLD was to attempt an OPEN HOLE completion and/or encounter oil and/or gas in estimated commercial quantities at a lesser depth, BLACK GOLD may, at it's option, elect to cease drilling activities and attempt completion of said well as a commercial producer at a depth less than the said twenty-eight hundred (2800) feet which penetrates the Wilcox Sand.

PARTICIPANT states that he and/or she desires to join BLACK GOLD in the drilling of the said well and a portion ownership interest in same upon the terms and conditions hereinafter described:

NOW THEREFORE, and in consideration of the sum of _____ ($) DOLLARS paid in hand by PARTICIPANT to BLACK GOLD, BLACK GOLD hereby covenants and agrees to sell, transfer and assign to PARTICIPANT a well site lease tract set out by the field rules and regulations and/or the General Rules and Regulations of the Oil and Gas Conservation Division of the Corporation Commission of the State of Oklahoma, whichever takes precedence in the area of the lease tract as to well spacing; and PARTICIPANT agrees to accept a

---

( ) of 0.750000 working interest (Decimal working interest represents 100 per cent of the working interest after allowance has been made for the amounts of Royalty

and Overriding Royalty being deducted and said Royalty and Overriding Royalty interests are to be free and clear of all development costs and operating expenses; but shall pay proportionate amounts of state oil and/or gas taxes).

PARTICIPANT'S amount of assigned working interest from BLACK GOLD after the well is completed to a stable production status, the following terms and conditions shall be abided to as mutually agreed between the parties of this AGREEMENT:

1. BLACK GOLD shall pay for all of the lease acquisitions and shall have the necessary legal work performed to assure good and valid title of the lease tract clearing the right to drill for, produce and sell any oil and/or gas produced from the said lease tract; shall have the necessary engineering and survey work completed to stake the well's location; shall file the necessary survey plat and other forms containing information to obtain a drilling permit shall cause to be drilled a well to approximately twenty-eight hundred (2800) feet; and in the event the well should appear to be non-commercial prior to pipe being wet, BLACK GOLD shall cause said well to be plugged and abandoned in compliance with the Rule and Regulations of the Oklahoma Corporation Commission without any additional costs to the PARTICIPANT. However, if the Lithology of the drilled cutting samples and the Induction Electric Log together with the Compensated Density Log by interpretation indicate to BLACK GOLD'S personnel and or it's representatives that the well appears to be capable of being productive of oil and/or gas in commercial quantities; PARTICIPANT agrees and endorses BLACK GOLD to commence to attempt completion of the said well to a production status if possible by present completion methods and equip same to produce oil into the storage tank battery and/or gas into the flow line.

PARTICIPANT shall pay in hand to BLACK GOLD a sum of _____ ($) DOLLARS additionally for Completion and

Equipping Costs and the PARTICIPANT agrees to pay said sum to BLACK GOLD within five (5) calendar days from receipt of such verbal notice from BLACK GOLD that an attempted completion is planned to be made on the well.

2. The assignment of working interests from BLACK GOLD to and in favor of the PARTICIPANT shall be subject to all of the terms, conditions and provisions of the Oil and Gas Lease acquired by BLACK GOLD from the LESSOR and/or LESSORS on the leases tract hereinbefore described. It is understood that the PARTICIPANT will be required to execute a Division Order that is to be provided by the Purchaser of the oil and/or a Gas Contract in the event gas production is obtained, produced and sold from the completed well located on the said lease tract.

3. It is understood and agreed to that the PARTICIPANT shall be a co-owner as a tenant in common with BLACK GOLD and others in the said leasehold estate hereinbefore described and shall not be a partner and shall elect to be excluded from the application of Subchapter K, Chapter 1, Subtitle A, of the Internal Revenue Code, as now or hereinafter amended.

4. In the event the well was to be completed to a production status, PARTICIPANT agrees to sign an Operating Agreement to be provided by BLACK GOLD prior to receiving the assignment of working interest; and BLACK GOLD shall be and remain to be the Operator of the well drilled upon the lease tract; and PARTICIPANT agrees to pay his and/or her pro-rata share of the costs of operating, properly maintaining and protecting the said well, equipment and leasehold estate. Such operating costs shall be billed monthly or quarterly as BLACK GOLD should elect to do as it's choice, and PARTICIPANT agrees to pay same within ten (10) calendar days after receipt of said billing.

5. BLACK GOLD shall at all times keep such leasehold estate free and clear of all labor, material, mechanic and other liens and encumbrances arising from conducting operations upon the lease tract. BLACK GOLD as Operator

shall have a Lien of Privilege on any working interest owner's proceeds from any produced and sold products from the said lease tract upon written notification to the Purchaser of said products in the event the PARTICIPANT refused to pay his and/or her pro-rata portion of billed operating costs creating an unnecessary burden to the other PARTICIPANTS and the Operator.

6. It is further understood that BLACK GOLD is to drill and attempt the completion on a TURNKEY PRICE basis to the PANTICIPANT within the amounts hereinbefore stipulated. In any case and under any circumstances will the PARTICIPANT be assessed any additional costs from the drilling of the said well to the casing point, other than the sum set out hereinbefore, which the PARTICIPANT has agreed to pay for his portion of working interest in the leasehold estate. The only exception to this provision extended to the PARTICIPANT would be as a direct result of "FORCE MAJEURE" which is beyond anyone's control. If this event should ever occur, BLACK GOLD would be required to immediately notify the PARTICIPANT of what has happened and the estimated cost and impact to the well's status as a result of the event and the related damage.

WITNESS THE EXECUTION HEREIN ON THE DATE SET OUT HEREINBEFORE:

BLACK GOLD OIL COMPANY

/s/ B. J. PINTER	/s/ MAURICE K. DAHL
BY: B. J. PINTER	BY: Participant

Please make all checks payable to BLACK GOLD OIL COMPANY, stub check information as ANTWINE NO. 2C WELL, LOCATED IN SECTION 10, T14N, R11E, IN OKMULGEE COUNTY, OKLAHOMA and make the additional notation of "Drilling and Logging" or "Completion and Equipping".

COST SCHEDULE

Working Interest Amont	Drilling and Logging	Completing and Equipping
1/16th of 0.750000	$ 7,680.00	$ 7,280.00
1/8th. of 0.750000	15,360.00	14,560.00
3/16th of 0.750000	23,040.00	21,840.00

TESTIMONY OF MAURICE DAHL

Filed February 4, 1985
In the District Court of the United States for the Northern District of Texas, Dallas Division

CA3-82-1867-G

MAURICE DAHL, et al.

v.

BILLY J. "B.J." PINTER, et al.

[1]

Proceedings

* * * * *

[3]

MAURICE DAHL, having been called as Plaintiff, being first duly sworn, was examined testified on oath as follows:

* * * * *

DIRECT EXAMINATION

BY MR. SPINUZZI:

[7]

Q. Do you know a person named Gary Clark?

A. Yes. Gary Clark is a friend of mine in Newport Beach. He works for Monnings. He was a gold and silver commodities broker, and I was a personal friend with him in the Newport Beach area where I lived. Associated with him on a personal basis at various social functions and things like that.

Q. What about Wendy Grantham?

A. She's somebody that I have known for, oh, around four years I guess it is, four, four and a half years or something like that.

Q. And she's a friend of yours?

A. Yes, she is.

[8]

Q. And where does she live?

A. She lives at 9546 Riverton in Dallas.

Q. How about Robert Daniele?

A. He's a lifetime friend that I have known since about the fourth or fifth grade in grammar school. He was one of my best friends. He was the best man at my wedding when I got married in the twenties, around twenty or twenty-two years old, and I kept in close contact with him. He worked for me when I owned a company called Mammoth Properties in California. He's still one of my closest friends.

Q. Who's Charles Dahl?

A. He's my brother; lives in San Diego, California.

Q. How old is Charles?

A. He's thirty-nine.

Q. Who's Dowayne Bockman?

A. Dowayne Bockman is a person that I knew through association of Dilbeck and Dahl Development Corporation. He was with a company that did the earthmoving and grading and off-site improvements for our developments, and while we were in the construction business for about a period of five years he handled the contracts with our company, and that's how I became familiar with him.

Q. Ray Dilbeck. Who's Mr. Dilbeck?

A. He is my partner with Dilbeck and Dahl Development Corporation in California. I first went into the real estate [9] business and worked for him as a salesman for several years, and we struck up a friendship from that, and oh, that has to be fifteen, eighteen years ago when I first met him, and then we started a company called Dilbeck and Dahl Development Company and started in the building and developing construction business together.

Q. How old is Mr. Dilbeck?

A. He would have to be in his mid-fifties. I'm not exactly sure.

Q. Richard Koon, who is he?

A. Richard Koon is somebody that is named to me Rick Koon. He is a vice president with Crocker Bank now. I first met him when he was with Bank America in the construction loan development in Riverside, and he presided over the construction loans for our construction company for a period of four, five years, and I had direct contact with him in administration and association of loans for our development projects.

Q. Where does he reside?

A. Currently he resides some place in Los Angeles. He did reside at the time in Riverside, and then sometime later he was transferred to San Francisco when he moved from the Bank of America to Crocker Bank, and now I understand that he's back in Los Angeles with the Crocker Bank.

Q. You are speaking of Riverside, California?

[10]

A. Riverside, California, uh-huh.

Q. Who is Art Overgaard?

A. Art Overgaard is the insurance agent that handled all of our insurance and bonding for Dilbeck and Dahl Development Company, and I have been associated with him since we started our construction company for that same five or something year period of time.

Q. Where does Mr. Overgaard reside?

A. He's in Glenndale, California, and that's where the primary office of Dilbeck and Dahl kept their records. Ray Dilbeck has his real estate brokerage at that Glenndale location, and Art Overgaard is in a close proximity to that.

Q. Who's Jack Yeager?

A. Jack Yeager is the owner of Yeager Construction Company, which is the earthmoving company that Dowayne Bockman works for. Jack Yeager was introduced to me by Dowayne Bockman and through our sub-contracting with earthmoving and grading and subdivision of our properties, I became acquainted with Mr. Yeager, and that's how that association came about.

Q. Where does Mr. Yeager reside?

A. He resides in Riverside, California.

Q. What is Accra Tronics Seals Corporation?

A. It's a corporation that's owned by a school boyfriend of mine. His name is Delbert Jones, and I have known him [11] since the third grade or fourth grade in grammar school and went through school and went through the service with him and still a very good friend of mine. He owns Accra Tronics with a person by the name of Bill Fish, and they are partners in that business, and they are in the business of making seals for the aerospace business in Burbank, California.

Q. And who's Aaron Heller?

A. He is my personal accountant and a friend that I have known for many years. I first became associated with him through a friendship. He was the next door neighbor to my first wife and I have known him probably for a total of twenty-seven years. He has handled my personal taxes I would say for the last ten, twelve years.

Q. Now, Mr. Daniele, Charles Dahl, Dowayne Bockman, Ray Dilbeck, Richard Koon, Art Overgaard, Jack Yeager, Accra Tronics Seals Corp and Aaron Heller are all plaintiffs in this case, correct?

A. Correct.

Q. During the year of 1981 did all of those persons reside in the State of California?

A. That's correct.

Q. And Mrs. Grantham is also a plaintiff in this case?

A. Correct.

Q. But during 1981 she resided here in Dallas, Texas; is that correct?

[12]

A. Correct.

* * * * *

[31]

Q. Was the money to be delivered to Mr. Pinter doing business as Black Gold permanently? Was the money to be his?

A. No. No.

Q. What was the arrangement specifically?

A. The arrangements and idea behind this — I was interested in being involved in some successful drilling operations and for the opportunity of being able to invest and drill on leases that appeared to be very high in production of oil and gas. I was told that by putting up [32] money for these leases and holding them for a period of time until I either funded the complete drilling of wells or put up some money and other investors were involved and the money was funded and the well was drilled. My funds that were put up for the individual leases would be returned to me, and there would not be an overriding royalty other than the overriding royalty that was purchased for the one-sixteenth overriding royalty. These monies did not involve any type of an overriding royalty or ownership whatsoever.

Q. Merely an advance of funds for right of first refusal in the future.

A. That's correct.

* * * * *

[81]

Q. As a result of these conversations with Mr. Pinter concerning the Clark and Watkins leases and the data given to you, did you have occasion to contact Mr. Bob Gottsch concerning the possibility of drilling these leases?

A. Yes. Mr. Gottsch invested half the money in the McFarland well, the only well that I was involved in drilling. I put up the other half of the money. Mr. Gottsch put up half the money, and when the Watkins and the Clark leases were presented to me by Mr. Pinter, I did not have the

resources to go forward with the type of drilling program that Mr. Pinter was indicating. He wanted to go forward with a three-well drilling program for the Watkins and Clark, and then he was drilling two other wells at the same time, the Doss and the Antwine. Five wells. And the moment we completed these wells, we had drilling obligations on the Watkins lease to drill a well of six months [sic], and then we would certainly have offset wells off the Walter and Emanuel [82] Clark leases, and my resources were adequate for a small drilling program for a small operation, but I did not have the type of money that it appeared would be necessary here so I contacted Mr. Gottsch and explained to him about the property, and he was interested, and he came down and got involved in this drilling.

* * * * *

[85]

Q. Now, the first call reflects a total or $363,600.00 to be put up by you and Mr. Gottsch. Was that done?

A. That's correct.

Q. What portion of that did you put up?

A. Half of it.

Q. And Mr. Gottsch put up the other half?

A. That's correct.

Q. And how were those funds — I notice it says please interbank wire. That transferred the capital to Buckner State Bank?

A. That's correct.

Q. Who actually wired the funds?

A. The funds were wired from Bob Gottsch's bank, and the total amount was wired to Mr. Pinter.

Q. Was your account charged with a portion of that, the fifty per cent you are talking about?

A. Mr. Gottsch refunded [sic] the money, and I repaid him for my half.

Q. At a later time did Mr. Gottsch have occasion to send additional money by wire?

A. Yes. When the three wells were drilled, logged and indicated to be successful by Mr. Pinter, he called for the completion money, and the completion money was sent by wire and then to Mr. Pinter.

Q. Is that the $140,000.00 dollars referred to in the next to the last paragraph?

A. That's correct.

Q. How much of that was yours and how much of it was Mr. Gottsch's?

A. The same percentages. Fifty per cent by me and I reimbursed Mr. Gottsch at the same time.

* * * * *

[152]

CROSS-EXAMINATION

BY MR. SPARKS:

* * * * *

[171]

Q. Where was he [Mr. Ed Minor] to obtain the money to be used to produce leases that you would pay for the acquisitions?

A. Mr. Minor — Mr. Minor's background was in raising money. And it was going to be his responsibility [with Puma Petroleum] to bring the investor money together to actually drill wells on the [172] leases that the company acquired.

Q. Now, you say that he did, in fact, acquire two leases?

A. Yes, sir.

Q. So at least as to that portion of his duties and responsibilities he was successful, would that be a fair statement?

A. Incorrect.

Q. I took your statement to imply as much. Could you explain. If that's not correct, why not?

A. He obtained two leases, but the leases were obtained from people who were considered to be — Well, I found out to be in the fraudulent area of the oil and gas business. And one of the leases had a short term on it and ended up expiring before Mr. Minor was able to do anything for it, and he was in the process of getting a prospectus written up by legal counsel here in this town which cost me ten thousand dollars, and that lease expired and was no good, and the other lease was located in Nawada [sic] up in Oklahoma, and that turned out to be a non-production area, but just a producer's paradise, and so after finding this our and finding out about his expertise and the ability to lose money, that's how he also lost a job.

Q. When you stated the producer's paradise, did you mean promoter's paradise?

A. Pardon me.

* * * * *

[180]

Q. Could you briefly describe what Mr. Kirk's background is, as you recall?

A. Mr. Kirk's background was in — He worked for an oil company here in town. The name escapes me right at the time, and he also located, acquired and sold leases. That was the primary function of his coming with me.

[182]

Q. Again, what was he [Dean Kirk] to accomplish with Puma when you first brought him on? I understand that —

A. I had a number of contracts in the oil and gas business as far as obtaining leases. He indicated that he could find good leases to be drilled that had possibilities of production, and he had quite a bit of prior knowledge in the business.

* * * * *

[188]

Q. When Mr. Gottsch decided to invest in McFarland lease, how did this take place, how did that come about?

A. I talked to Mr. Gottsch, Mr. Gottsch is a personal friend and business partner with my brother-in-law. My brother-in-law raises pigs in the Hastings, Nebraska area and Mr. Gottsch is a cattle feeder, and they did business back and forth, and I did business with both of these people, and my brother-in-law passed away or else he probably would have been my partner in it, and he was interested in the oil and gas business. Since he passed away, I had conversation with Mr. Gottsch, and he was interested in putting some money in the oil and gas business, and so he and I more [189] or less on hand shakes said let's go drill a well and so that's effectively what we did.

* * * * *

[193]

Q. Wouldn't it be a fair statement to say that you did not have the financial ability at least with regard to the McFarland lease to do that on your own and you needed some help in that case?

A. Yes, I was not interested in dril'ing wells heads up all by myself. I did not think that to be a wise decision.

* * * * *

[281]

MR. SPINUZZI: If I may, your Honor, to save time all of the documents relating to other plaintiffs who are investers, if he wants to enter them in evidence we will stipulate to them because Mr. Dahl testified he had those taken to California with him. So we have no objection to entering them.

MR. SPARKS: My point is not the validity of the document, which I think the documents speaks for itself, and the consideration, etcetera, are not something that are before the Court.

BY MR. SPARKS:

Q. My point with these documents, Mr. Dahl, is this. On all or most of these documents you helped the California investers. You filled out the blanks for their names, the [282] date of the document, the percentage of their interest; isn't that correct?

A. Yes.

* * * * *

TESTIMONY OF ROBERT GOTTSCH

Filed February 4, 1985
In the District Court of the United States for the Northern District of Texas, Dallas Division

CA3-82-1867-G

MAURICE DAHL, *et al.*

v.

BILLY J. "B.J." PINTER, *et al.*

[202]

Proceedings

ROBERT GOTTSCH having been called as a witness on behalf of the Plaintiff, being first duly sworn, was examined testified on his oath as follows:

DIRECT EXAMINATION

BY MR. SPINUZZI:

Q. Would you state your name for the record, please.

A. Robert Gottsch.

Q. Where do you live, Mr. Gottsch?

A. Elkhorn, Nebraska.

Q. What is your business or occupation?

A. I'm in the cattle feeding business.

* * * * *

[203]

Q. Shortly after you engaged in the partnership arrangement with Mr. Dahl on the McFarland well, did you have occasion to meet with a gentleman named B. J. Pinter?

A. Yes.

Q. Can you recall approximately when that was?

A. That was probably half a year later.

Q. All right. That would be approximately in the fall of 1980?

A. Yes.

Q. Or excuse me. Spring of 1981, perhaps.

A. Perhaps. In that area, yes.

* * * * *

[215]

Q. Going to Mr. Dahl, in connection with your business transaction with him, based on your testimony, you loaned him approximately two hundred fifty thousand dollars; is that correct?

A. Yes, sir.

Q. Actually two hundred fifty-one thousand. Did you draw up any formal papers in connection with Mr. Dahl in connection with that loan?

A. Not that I know of.

Q. What was your arrangement?

A. We had a gentlemen's agreement that I would furnish the money, and if the thing didn't go bad, he would pay me back somehow, and I said okay. Took him several years and he paid me back every dime.

* * * * *

[216]

CROSS EXAMINATION

BY MR. SPARKS:

* * * * *

[217]

Q. Well, sir. As I understood your testimony concerning the Oklahoma interest just a few moments ago, you were asked to summarize the nature of that business agreement, and you said I'd furnish the money and if the thing did not go well he'd pay me back; is that correct?

A. That's correct.

Q. So definitely in the Oklahoma situation with regard to Mr. Pinter's leases you were the person who was going to furnish all of the financial — all of the money at least initially; is that correct?

A. I was to furnish my share of the money.

[218]

Q. And you did, in fact, furnish Mr. Dahl's share?

A. That's right.

Q. Without a note or any piece of paper to reflect the fact that he owed you approximately — Well, exactly half of the money that you put in; is that correct?

A. That's right.

Q. Do you recall, Mr. Gottsch, approximately how much your total investment was — and by you, I mean yourself and Mr. Dahl — in order to acquire a three-eights interest in the three wells?

A. Be around a little over five hundred thousand.

* * * * *

[219]

Q. You were aware, were you not, that Mr. Dahl had purchased some overriding royalty interest in one of those leases?

A. I wasn't aware of it, and it won't be any of my business if he did.

Q. How did you first become aware, Mr. Gottsch, of this piece of property? Who contacted you, sir?

A. I don't know whether it was Maurice Dahl or whether it was Mr. Pinter.

Q. Do you know a man by the name of Dean Kirk?

A. I'm sorry.

Q. Dean Kirk?

A. I probably know him, but you'll have to place him for me.

Q. Well, sir, when you and Mr. Dahl decided to go into business with Mr. Pinter, was this through Mr. Dahl's corporation which was known as Puma Petroleum?

A. I don't remember anyone else really being involved. If they were involved, I really didn't pay any attention to [220] them you know.

Q. So if he wanted to use Puma Petroleum to be the vehicle, the titular vehicle, to which to refer to yourself and him, Mr. Dahl, that would have been okay with you and that would have been a detail, and he would have taken care of that?

A. I was doing business with Maurice, and who else he sent around was fine. I wasn't going to pay any attention to them at all.

Q. You relied on Mr. Dahl?

A. Yes, sir.

* * * * *

PETITIONER'S

BRIEF

No. 86-805

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

BILLY J. "B.J." PINTER, *et al.*, *Petitioners*,

v.

MAURICE DAHL, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

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Dallas, Texas 75201
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Counsel for Petitioners

July 24, 1987

QUESTIONS PRESENTED

Section 12(1) of the Securities Act of 1933 provides for a private right of action against any person who offers or sells a security without benefit of registration through use of the mails or interstate commerce.

The questions presented are:

1. Whether the long-established definition of a § 12(1) "seller" should be modified to incorporate a new threshold requirement that the "seller" must be motivated by a desire to receive a financial benefit for his efforts in order to be held responsible for his conduct.

2. Whether the common law *in pari delicto* defense is available in a private action for rescission of the sale of unregistered securities brought under § 12(1).

LIST OF PARTIES

The petitioners are Billy "B.J." Pinter, Black Gold Oil Company, Pinter Energy Company and Pinter Oil Company. Respondents are Maurice Dahl, Gary Clark, W. Grantham, Robert Daniele, Charles Dahl, Dowayne Bockman, Ray Dilbeck, Richard Koon, Art Overgaard, Jack Yeager, Accra-Tronics Seals Corporation and Aaron Heller.

TABLE OF CONTENTS

TABLE OF CONTENTS — Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES — Continued

TABLE OF AUTHORITIES — Continued

TABLE OF AUTHORITIES — Continued

No. 86-805

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

BILLY J. "B.J." PINTER, *et al., Petitioners*

v.

MAURICE DAHL, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a-1-24) is reported at 787 F.2d 985. Brown, C.J., dissented in an opinion. The denial of Petitioners' motion for rehearing and suggestion for rehearing *en banc* (Pet. App. a-25-29) is reported at 794 F.2d 1016. Jones, C.J., joined by Clark, Chief Judge, Gee, Jolly, Higginbotham and Davis, Circuit Judges, dissented in an opinion. The memorandum decision of the district court (Pet. App. a-30-38) is not reported.

JURISDICTION

The judgment of the court of appeals (J.A. A-94) was entered on April 18, 1986. A petition for rehearing with a suggestion for rehearing *en banc* was

denied on July 21, 1986, by a vote of 8 to 6. On October 14, 1986, Justice White extended the time within which to file a petition for writ of certiorari to and including November 18, 1986. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

15 U.S.C. § 77(l)(1). Any person who — offers or sells a security in violation of Section 77e of this title . . . shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

STATEMENT

This is an action for recovery for the sale of unregistered securities (fractional undivided interests in oil and gas leases). Without mentioning the *in pari delicto* defense asserted by the defendants against Maurice Dahl ("Dahl"), one of the plaintiffs, the district court granted rescission. Defendants appealed on the basis that Dahl should be barred from recovery because of his own wrongful conduct. The court of appeals affirmed, ruling that the defense does not apply to cases brought under § 12(1) of the Securities Act of 1933, and holding that Dahl was not a § 12(l) "seller."

Prior to the matter in controversy Dahl was engaged primarily in the California real estate brokerage business, had a net worth in excess of $1 million, and an annual income approaching $250,000 (Pet. App. a-30, a-31, ¶ 4). Dahl made several abortive and unsuccessful attempts to enter the oil business. He invested in several losing oil deals and formed

two closely held corporations to develop prospects "(Wrangler Oil" and "Puma Petroleum"). He hired two full-time employees, first Ed Miner ("Miner") and then Dean Kirk ("Kirk"), whose responsibility it was to bring investors' money together and drill wells (J.A. A-107).

Dahl became dissatisfied with Miner when he learned Miner had spent $10,000 to have a prospectus written up by legal counsel for use in financing the development of an oil and gas lease (J.A. A-108). He then hired Kirk, who located Pinter. Dahl learned from Kirk that Pinter was drilling and operating leases in Oklahoma and was interested in developing a "five-well program" (J.A. A-106). After contacting Pinter, Dahl toured the properties several times by himself, looking at the geology, drilling logs and production history assembled by Pinter, finally concluding that there was "no way he could lose" (Pet. App. a-32, ¶ 10).

Dahl initially loaned Pinter approximately $20,000 to "warehouse" or hold the leases until sufficient investor funds could be located to develop the properties (Pet. App. a-31, ¶ 9). Not wanting to drill "heads up" because he "did not think it wise to do so" (J.A. A-109), Dahl then contacted Robert Gottsch, his investment partner (J.A. A-109), pursuading him to "fund" approximately $500,000 to Pinter. In return, Dahl and Gottsch each acquired three-eighths of the working interest in three of the five wells (J.A. A-112).

After deciding to invest in the program along with Gottsch and Wendy Grantham, his girlfriend, Dahl contacted the remaining plaintiffs ("the California investors"), all of whom were either friends or family of Dahl (Pet. App. a-32, ¶ 11). The group included his accountant, his business partner, former and current employers and employees, his construction business suppliers and contractors, his

brother, and a corporation owned by a long-time friend (J.A. A-101-104).

Prior to purchasing his interests, Grantham accompanied Dahl to Oklahoma, met Pinter and toured the property. She acquired her interests because Dahl was doing so, and despite his warnings to her regarding the risks involved in the oil and gas business (Pet. App. a-32, ¶ 11). All of the other plaintiffs dealt exclusively with Dahl and decided to invest purely because of Dahl's involvement. Dahl, not Pinter, made all representations and communications to each of the California investors *(id.)*.

Dahl received a credit against future investments from his "warehousing" loan to Pinter, but he did not receive any commission as a result of his sales to the remaining plaintiffs (Pet. App. a-34, ¶¶ 21, 22). He helped each of the Califorina investors fill out their letter contracts, taking their checks and delivering them to Pinter (J.A. A-109). Each of the letter contracts contained the following language:

> WHEREAS the parties constitute a predetermined and limited group of sophisticated and knowledgeable well informed investors who desire to arrange for participation in an oil and/or gas drilling venture as an investment and do declare that it is not for the purpose of reselling their investment and do declare that it is not for the purpose of reselling their interest therein. (These participating interests are being sold without the benefit of registration under the Securities Act of 1933, as amended, and on reliance of [sic] rule 146 thereunder) (Pl. Exh. 17, R. V. 114, 114; J.A. A-95).

The wells ultimately proved unsuccessful and the plaintiffs brought suit. The court granted rescission under § 12(1), but denied the plaintiffs' fraud and § 10b-5 claims.

In assessing Dahl's involvement, the trial court made the following findings of fact:

* * *

24. Dahl solicited each of the other plaintiffs (save perhaps Grantham) in connection with the offer, purchase, and receipt of their oil and gas interests. Grantham apparently asked to purchase an interest after she heard of the interests from or through Dahl.

25. With respect to all plaintiffs except Dahl and Grantham, no evidence established any act or omission on the part of Pinter * * * actionable under § 10(b) or Rule 10b-5, which caused them any loss. With respect to Grantham, although she did deal with Pinter, the court finds that Dahl, not Pinter, was the person who caused her to purchase. Finally, with respect to Dahl himself, the court finds that he relied on his own investigation and observations, rather than on any representations by Pinter, in making his decision to purchase.

26. * * * the Court is pursuaded that Dahl would have purchased these interests even if any omitted facts of which he now complains had been disclosed to him. Given Dahl's "bell cow" role for the other plaintiffs, the Court believes that their decisions would not have been any different either. [Pet. App. a-34, a-35.]

Dahl was awarded rescission, along with the remaining plaintiffs. The court made no mention of the affirmative defenses of illegality, estoppel, contributory fault, aiding and abetting, or *in pari delicto*.[1] These defenses were asserted as to Dahl alone.

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[1]The original complaint bore the following allegation:

> The initial offer and sale of securities was made by PINTER and BLACK GOLD to M. DAHL, a California resident and, thereafter were made to the remaining Plaintiffs directly, or indirectly through M. DAHL. [R.I.4.]

Long prior to trial, Pinter moved the district court to have Dahl realigned as a third-party defendant (R. V. 163, ff.) because of his direct involvement in the sales, as stated in the complaint. The issue was referred to the U.S. Magistrate, who denied Pinter's motion on the basis that the pleading were "insufficient" to allow realignment (R. V. 189). Pinter's timely application for review of the Magistrate's Order (R. V. 190) was denied by operation of law.

The court of appeals, in a divided opinion, affirmed. The court acknowledged that Pinter "probably misapprehended its [sic] duty to register," that Dahl was an "equal producing cause of the illegal transaction" (Pet. App. a-9) and that Dahl's conduct "meets the substantial factor test of a § 12(1) 'seller' in causing the other plaintiffs to purchase" (Pet. App. a-13). Finding no evidence that Dahl knew the sales were a violation (Pet. App. a-7, a-9) the court concluded that "equal causation [does not] constitute equal fault" (Pet. App. a-9) and refused to "impose liabilty on Dahl for mere gregariousness" (Pet. App. a-14).

Petitioners' motion for rehearing and a suggestion for rehearing *en banc* were denied on July 21, 1986. The dissent, filed by Jones, Circuit Judge, with whom Clark, Chief Judge, Gee, Jolly, Higginbotham and Davis, Circuit Judges, joined, sharply criticized the panel majority's "major diversion" from the settled test of § 12(1) "seller," and its failure to "follow the obvious lead of the Supreme Court in *[B.] Eichler[H. Richards, Inc., v. Berner,* 105 S.Ct. 2622]" (Pet. App. a-29).

SUMMARY OF ARGUMENT

1. § 12(1) of the Securities Act of 1933 (" '33 Act") proscribes the offer, sale and delivery of an unregistered security. As defined by the court of appeals, a § 12(1) "seller" is one who parts with title to securities in exchange for consideration or one whose participation in the buy-sell transaction is a substantial factor causing the transaction to take place. See, *e.g., Davis v. Avco Financial Services, Inc.,* 739 F.2d 1057 (6th Cir. 1984), *cert. denied,* 105 S.Ct. 1359 (1985). Clearly, Dahl is a § 12(1) "seller." The Fifth Circuit's addition of a "pecuniary benefits" requirement to the settled definition of a § 12(1) "seller" in order to

avoid this conclusion threatens to undermine the regulatory purpose and effective enforcement of the securities laws.

Significant "seller" activity such as that exhibited by Dahl in this case is not "non-culpable." The wrongful nature and harmful effects of such conduct are foundational to the policy determinations which underly the registration provisions. The statutory scheme therefore throws the burden of disproving liability on those who sell unregistered securities to the public. Liability is imposed upon a "seller" concommitant with his acquisition of the privilege of doing business through the channels of commerce. Limiting responsibility only to those who may be shown to have intended to benefit themselves flies in the face of these policies. The public may be injured whether the "seller" intends to profit or not.

Knowledge of the duty to register, or that the failure to do so is a violation of the law, is irrelevant to § 12(1) "seller" liability. It is the sale of unregistered securities, not the state of mind of the "seller", which is should be prevented. With all the facts available to a defendant "seller," it would normally be impossible for a buyer to prove the "seller's" state of mind or his knowledge of the duty to register. For these reasons, requiring proof of *scienter* in any form is neither pertinent nor appropriate under § 12(1).

Dahl clearly intended to profit as a result of his efforts in connection with the sales. He was far more critical to the initiation of the offering than a "happy hour investment adviser." The Court need not speculate on whether a true cocktail hour conversationalist might be found liable under the "substantial factor" test.

Finally, consistent with the determination that Dahl is an equally responsible § 12(1) "seller" as to the remaining

plaintiffs, he should be held liable in contribution to Pinter for their claims.

2. Contrary to the opinion of the court of appeals, the rule of *A. C. Frost & Co. v. Coeur d'Aline Mines Corp.*, 312 U.S. 38, 43 (1941), that an express private right of action brought under the Securities Act of 1933 may be barred on the grounds of the defendant's own culpability, is in furtherance of the fundamental statutory policy of investor protection and should not be discarded. This Court recently reaffirmed *Frost* in *B. Eichler, H. Richards, Inc., v. Berner,* 105 S.Ct. 2622 (1985). Under *Eichler,* recovery should be denied under the securities laws only where (1) as a direct result of his own actions, a plaintiff bears at least substantially equal repsonsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and the protection of the investment public. Contrary to the court of appeals' view, *Eichler* is not limited to '34 Act cases. § 12(1) "seller" conduct is wrongful. To confer upon any such conduct a presumption of "non-culpability" is contrary to settled law, unsound as a matter of securities policy, and threatens to undermine the effective enforcement of the securities laws.

In the words of the Court of Appeals, Dahl's efforts were an "equal producing cause of the illegal transaction" (Pet. App. a-9). Dahl, a sophisticated investor, had formed two oil companies and invested in several failed oil deals in his abortive efforts to get into the oil business. Not wanting to drill "heads up" because he did not think it to be wise, Dahl hired employees to locate leases and investors, sought out Pinter, initiated the transaction at hand, conducted his own investigation of the properties, decided on a five-well "package" suggested by Pinter, warehoused the leases until

other investors could be found, caused a non-party investor to "fund" approximately $500,000 to finance three of the five wells involved, and borrowed $250,000 from this individual to purchase the majority of his own interests.

Dahl solicited all of the remaining plaintiffs (save perhaps Grantham, his fiance, who purchased because Dahl was doing so). Dahl, rather than Pinter, made all representations to each remaining plaintiff, helping them fill out their letter contracts, and delivering their checks to Pinter. While he did not receive a commission for his sales efforts, he had a vested interest in seeing the deal adequately financed.

Dahl was aware that the securities in question were unregistered. Contrary to the view of the court of appeals, he was probably also aware of the *duty* to register. Because of his preeminent role in this transaction, he should be barred from recovery from Pinter. This result works no interference with the effective enforcement of the securities laws or the protection of the investment public. To the contrary, applying the *in pari delicto* defense under these facts is consistent with the purpose of the law and should further its effective enforcement.

ARGUMENT

I.

THE ADDITION OF A "PECUNIARY BENEFITS" REQUIREMENT TO THE SETTLED DEFINITION OF A SECTION 12(1) "SELLER" OF UNREGISTERED SECURITIES IS CONTRARY TO THE INTENT OF CONGRESS, TO SETTLED LAW AND TO SOUND SECURITIES POLICY.

A. CONDUCT WHICH IS A "SUBSTANTIAL FACTOR" IN THE SALE OF UNREGISTERED SECURITIES IS HARMFUL AND HAS PROPERLY BEEN PROHIBITED REGARDLESS OF THE PRESENCE OR ABSENCE OF PECUNIARY BENEFIT TO THE SELLER.

Section 12(1) of the Securities Act of 1933 provides as follows:

> Any person who * * * offers or sells a security in violation of section 77e of this title, * * * *shall be liable* * * *. [15 U.S.C. Sec. 77l(1); emphasis supplied.]

A purchaser of an unregistered security may sue a "seller" under § 12(1). In order to recover a plaintiff must establish an offer, sale or delivery after sale of a security, made by the defendant through the use of the mails or by means of transportation or communication in interstate commerce. *U.S. v. Ashdown,* 509 F.2d 793, 799-800 (5th Cir. 1975), *cert. denied,* 423 U.S. 829 (1975). The plaintiff must also establish that the security had not been registered under § 5 of the '33 Act. *(id.)*. A purchaser who establishes an offer, sale or delivery without benefit of registration is entitled to rescission under § 12(1).

The Fifth Circuit definition of a § 12(1) "seller" is as follows:

> (1) One who parts title to securities in exchange for consideration; or
>
> (2) one whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place.

Swenson v. Engelstad, 626 F.2d at 426-27; *Pharo v. Smith,* 621 F.2d 656, 667 (5th Cir. 1980); *Hill York Corp. v. American International Franchises, Inc.,* 448 F.2d 680, 692-93 (5th Cir. 1971). The Fifth Circuit rule has been widely discussed and adopted in the circuits. See, *e.g., SEC v. Murphy,* 626 F.2d 633, 650 at n. 18 (9th Cir. 1980); *Davis v. Avco Financial Services, Inc.,* 739 F.2d 1057, 1064-67 (6th Cir. 1984), *cert. denied,* 105 S.Ct. 1359 (1985), and cases cited therein.

The "substantial factor" test is essentially one of proximate cause. See *Hill York, supra; SEC v. Wasson,* 558 F.2d 879, 886 (8th Cir. 1977) (issue as to § 12(1) "seller" liability is whether the defendant was uniquely positioned to ask relevant questions, acquire material information, or disclose findings). See also, *Fund of Funds, Ltd. v. Arthur Andersen & Co.,* 545 S.W.2d 1314, 1353-55 (D.C. S.D.N.Y. 1982) (§ 17(a)(3) "seller").

In the case at bar, the panel majority specifically found that Dahl met the "substantial factor" test. Nevertheless, the court held that Dahl was not a "seller" because, in the eyes of the court of appeals (not necessarily those of the trial court), he was not motivated by a desire for profit in the sales:

> * * * Notwithstanding our conclusion that Dahl meets the substantial factor test, we decline to hold that he is a "seller" for the purposes of section 12(1). * * * Absent express direction by congress, we decline to impose liability for mere gregariousness. [Pet. App. a-14.]

Thus, the issue before the Court in the first Point of this brief is whether the long-established definition of a "seller" of unregistered securities for the purposes of § 12(1) of the '33 Act should be modified to incorporate a threshold requirement that the "seller" must be motivated by a desire to receive a financial benefit in order to be held responsible for his conduct.

Edith Jones, Circuit Judge, dissented from the denial of petitioners' motion for rehearing and suggestion for rehearing *en banc* along with Clark, Chief Judge, Gee, Jolly, Higginbotham, and Davis, Circuit Judges (Pet. App. a-26, ff.). Judge Jones sharply criticised the panel majority for its decision to abandon the "substantial factor" test:

> Until this opinion, expectation of financial benefit played no role — express or implied — in determina-

tion of "seller" status. * * * this new restriction has absolutely no foundation in either settled securities law or its underlying policies. * * *

[T]he panel majority has erred in its choice of controlling legal principles rather than its application of settled law to the facts. The practical implication of its error is obvious. A fence-straddler, such as Dahl, can promote and participate in an illegal sale of unregistered securities and, if the investment does not pay off, turn around and sue the issuer to recover his investment. This lamentable result may actually encourage future violations, thereby thwarting federal securities policy.

* * * *Reshaping the law in order to reach a predetermined desired outcome has created an ill-conceived precedent on two significant legal issues affecting securities litigation.* Believing it is our duty to refrain from such reshaping and to follow the obvious lead of the Supreme Court in *Eichler,* I dissent from the Court's denial of rehearing en banc. [Pet. App. a-28-a-29.]

As indicated by Judge Jones, the presence or absence of a desire to obtain a pecuniary benefit is and should be irrelevant to § 12(1) "seller" liability.

B. UNAUTHORIZED "SELLER" CONDUCT IS HARMFUL TO THE INVESTMENT PUBLIC SHOULD BE STRICTLY PROSCRIBED.

In 1933, President Franklin Roosevelt stated in his message to Congress regarding the proposed Securities Act:

> There is * * * an obligation upon us to insist that every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information * * *.
>
> This proposal adds to the ancient rule of *caveat emptor,* the further doctrine, "let the seller also beware." * * * It puts the burden * * * on the seller * * *. The purpose of the legislation I suggest is to protect the public with the least possible interference to honest business. [Letter dated Mar. 29, 1933, *quoted* in H.R. REP. No. 85, 73rd Cong., 1st Sess. 1-2 (1933).]

The "seller" beware philosophy suggested by President Franklin was ultimately adopted by Congress. The House and Senate accomplished the goal of balancing the interests of honest business and the need for the investment public to be protected from harm by throwing the burden of defending his conduct upon the seller and *relieving the purchaser from proving any evil intent*. This approach was justified by the conclusion that "seller" conduct is inherently dangerous to the investing public:

> The provision throwing upon the defendant in suits under sections 11 and 12 the burden of proof to exempt himself are indispensible to make the buyer's remedies under these sections practically effective. Every lawyer knows that with all the facts in control of the defendant it is practically impossible for a buyer to prove a state of knowledge or a failure to exercise due care on the part of defendant. *Unless responsibility is to involve merely paper liability it is necessary to throw the burden of disproving responsibility for reprehensible acts of omission or commission on those who purport to issue statements for the public's reliance. The responsibility is no more nor less than that of a trust * * * . Liability is imposed upon them as a condition of the acquision of the privilege to do business through the channels of interstate or foreign commerce.* * * * it is the essence of fairness to insist upon the assumption of responsibility for making of these statements. [H.R. REP. No. 85, 73rd Cong., 1st Sess. 9-10 (1933).] (Emphasis supplied.)

Any offer, sale or delivery of an unregistered security in violation of § 12(1) is in breach of a responsibility to the investing public which is imposed upon all who enjoy the privilege of doing business in interstate commerce.

The imputation of statutory liability in return for the exercise of this privilege is fair and reasonable because of the obvious potential for great harm stemming from securities law violations and the need for effectual remedies to the investing public. It does not follow to classify "seller" conduct as "non-culpable", or as conduct not "offensive to the dictates of natural justice" (Pet. App. a-10). In light of the harmfulness of "seller" conduct and the need for effective remedies against its occurrence, these characterizations can only lead to discussing the availability of the *in pari delicto* defense upon the basis of confusion. In certain circumstances the purpose of the statute may be better served by denying recovery to a plaintiff than by granting it. Under these circumstances, the defense is justified.

C. THE ADDITION OF A "PECUNIARY BENEFITS" REQUIREMENT TO THE SECTION 12(1) "SELLER" TEST WILL INTERFERE WITH THE EFFECTIVE ENFORCEMENT OF THE SECURITIES LAWS.

In the case at bar, the court of appeals declined to impose liability upon Dahl because his "seller" activity was, in the eyes of the court, "without fault or knowledge" (Pet. App. a-14). As has been pointed out, by enacting the strict liability registration provisions, the legislature indicated a contrary conclusion. The congressional enactment of a statute imposing liability without regard to *scienter* or state of mind imputes "fault" and declares that knowledge is irrelevant because the conduct is harmful *per se*. It makes little sense to accord this conduct the appellation of "non-culpability" (*id.*; Pet. App. a-9). This reasoning fails to properly classify and therefore adequately discourage clearly harmful activity, in contravention of the basic regulatory purpose of the law.

1. THE "PECUNIARY BENEFITS" TEST INCORPORATES CONCEPTS OF MOTIVE OR *SCIENTER* WHICH ARE NOT RELEVANT CONSIDERATIONS TO "SELLER" LIABILITY.

Implicitly, a requirement of proof of motive or desire to receive financial benefit as a prerequisite to allowing recovery from one whose conduct was a substantial factor in an unlawful sale of unregistered securities is a rejection of settled conclusions regarding the inherent wrongfulness of such conduct and the widespread harm resulting from it. This unwarranted change in the policy considerations underlying the law will result in a commensurate diminution of the power to force "sellers" to make certain they are entitled to an exemption from registration by offering severe consequences as the alternative. The addition of a such a requirement undermines sound securities policy because it turns the tables on the investing public, requiring proof of evil intent where state of mind is immaterial.

2. A "PECUNIARY BENEFITS" TEST WILL UNNECESSARILY INCREASE THE EVIDENTIARY BURDEN PLACED UPON AN INJURED PARTY.

With all the facts normally being in the control of a defendant "seller," it will usually be impossible for a buyer to prove a state of knowledge or a failure to exercise due care on the part of the "seller." From the practical standpoint, an inquiry into the state of mind of a "seller" in a manner such as the one suggested by the court of appeals, *i.e.*, an attempt to determine whether he purchased securities "knowing that [the issuer's] failure to register *violated federal statute*" (Pet. App. a-7), as distinguished from the fact that he knew the securities to be *unregistered* (*id.*, at a-5), is wholly unsupportable. Indeed, either test should be avoided.

Secondly, it would be a simple matter for a defendant in any such case to adduce testimony from an attorney, stockbroker, accountant or other sophisticated witness that one could not have "known" that selling a given unregistered security violated federal statutes. The defensive avenues opened up by such a shift in the burden of proof are almost limitless. The introduction of intent as an element of proof for a plaintiff seeking statutory rescission in nonregistered sale cases would unduly protract and greatly increase the expense of such litigation.

An additional problem inherent in the adoption of a rule requiring proof of *scienter* is the likelihood that a transgressor who *does* know of the duty to register and wishes to avoid responsibility for his part in not doing so will simply be circumspect. Intent is generally proven circumstantially. The greater the "culpability" (*i.e.*, knowledge of the legal duty to register), the greater the likelihood that the culpable party will use his knowledge of the law to avoid liability.

3. INCLUSION OF A "PECUNIARY BENEFITS" TEST OR *SCIENTER* AS AN ELEMENT OF PROOF WILL INHIBIT EFFECTIVE ENFORCEMENT OF THE SECURITIES LAWS.

The '33 Act was specifically created to require the disclosure of material information through registration. Except for the specified exemptions, registration as a prerequisite to the transfer of securities is a fundamental concept underlying the Act. As Professor Loss has recognized, the registration requirements do not foster disclosure through engendering the avid reading of prospectuses by the investing public; the registration requirements work *indirectly* by creating an environment enforcing full disclosure.[2] Consis-

[2]PROFESSOR LOSS: Like most people, I am partly realist and partly dreamer. I have long since decided to my own satisfaction that any success of the disclosure philosophy is not primarily attributable to the fact that people get and read prospectuses. I do not think most people read prospectuses, or could understand them if they did read them. I think that the disclosure device works indirectly, partly by keeping people clean and partly because the information is read by people knowledgeable in the area. You have heard these arguments before.

I do not think anybody in this room, including Chairman Cary, will deny that life under the securities acts is getting too complicated. This is inevitable as law develops.

tent with this methodology, the duty to register should be virtually absolute (*id.*).

The presence or absence of pecuniary benefits to an individual substantially involved in the selling process should not be a relevant consideration in determining liability for failure to register. Conduct which is a substantial factor in the transfer of an unregistered security is and should be actionable because of the harm which may befall the innocent investor through nondisclosure. The primary regulatory enforcement tool is civil litigation between private citizens. The efficacy of this mechanism will be reduced by addition of a "pecuniary benefits" test to the 12(1) "seller" rule.

D. CONTRARY TO THE COURT OF APPEALS' CONCLUSION, IN ADDITION TO HIS INVOLVEMENT AS A "SUBSTANTIAL FACTOR" IN THE SALES, DAHL WAS PROBABLY AWARE OF THE DUTY TO REGISTER AND HE ALSO HAD A SIGNIFICANT PECUNIARY INTEREST IN SEEING HIS INVESTMENT ADEQUATELY FINANCED.

1. THE COURT OF APPEALS MISTAKENLY CONCLUDED THAT DAHL WAS NOT AWARE OF THE DUTY TO REGISTER.

The court of appeals' conclusion that Dahl was not liable because his conduct is "without fault or knowledge" (Pet. App. a-14) is not supported by the trial court's findings or the record. To the contrary, they support the conclusion that Dahl was aware of the duty to register. Dahl had hired a full-time employee to look for investors. He testified that he became dissatisfied with him while in the process of having an attorney prepare an expensive prospectus. The letter contracts themselves stated that the securities were not registered in reliance upon the private offering exemption. Dahl helped each of the other plaintiffs fill out their letter contracts and must have gone over this language with them. These circumstances lead to the reasonable conclusion that Dahl probably knew of the duty to register and was on notice that the offering could be in violation of the law.

2. THE COURT OF APPEALS MISTAKENLY CONCLUDED THAT DAHL DID NOT HAVE A PECUNIARY INTEREST IN SEEING HIS INVESTMENT ADEQUATELY FINANCED.

The trial court found that Dahl "solicited" and "caused" the purchases made by all of the other plaintiffs, playing the "bell cow" role in their decisions to invest. He also held that "[a]ll of the other plaintiffs [except Dahl's fiance,

Grantham] dealt only with Dahl, not Pinter, and decided to invest because of Dahl's involvement," and that Grantham invested because Dahl did so, despite the fact that Dahl had warned her of the risks inherent in the oil and gas business (Pet. App. a-32, a-34-35; ¶¶ 11, 24, 26). His findings are silent on the issue of Dahl's pecuniary interest in the transaction.

The court of appeals nevertheless concluded that Dahl had no such interest. In arriving at this result, the court twisted logic as well as facts:

> We have no difficulty in finding that Dahl's conduct was a "substantial factor" in causing the other plaintiffs to purchase securities from Pinter. *No plaintiff had any familiarity with the Pinter oil and gas interests until contacted by Dahl. Dahl represented to these plaintiffs that based on his own investigations the investments could not lose. And, with the exception of Grantham [who purchased because Dahl did so], the plaintiffs relied exclusively upon communications with Dahl in making their decisions to purchase the securities.* * * *

> Notwithstanding our conclusion that Dahl meets the substantial factor test, we decline to hold that he is a "seller" for the purposes of Section 12(1). The substantial factor test was formulated and has been applied under facts which differ substantially from the facts of this case. * * * We believe that had this circuit previously been confronted with a *promoter of unregistered securities whose efforts were intended to benefit neither the seller nor himself*, we would have created a different test. That test would have incorporated a threshold requirement that the promoter be *motivated by a desire to confer a direct or indirect benefit upon someone other than the person he has advised to purchase.* We believe that a rule imposing liability (without fault or knowledge) on friends and family members who give one another gratuitous advice on investment matters unrea-

> sonably interferes with well-established patterns of social discourse. *Absent express direction by Congress, we decline to impose liability for mere gregariousness.* [Ret. App. a-13, a-10; emphasis supplied.]

Although the trial court held that Dahl did not receive any commission "by way of discount or otherwise" (Pet. App. ¶ 21, a-34), in light of the full record, this statement does not support the conclusion that Dahl would receive no benefit from bringing other investors on board, or that he had no pecuniary interest in the outcome of his sales efforts. In fact, the trial judge reached no conclusion regarding Dahl's pecuniary interest or motivation.

The trial court found that Dahl had a net worth of approximately $1,000,000, annual income approaching $250,000, and occupied himself in real estate and investments (Pet. App. a-30-a-31, ¶4). He noted that Dahl formed two closely held corporations, "Wrangler Oil Company" and "Puma Petroleum, Inc.," to acquire and hold royalty in working interests in oil and gas properties (Pet. App. ¶ 5, a-31). He detailed certain "abortive efforts to enter the oil and gas business" (*id.*, ¶ 5, ff.).

Dahl testified on direct examination in at trial that Miner's "responsibility with Puma Petroleum [was] to *bring the investor money together*" and drill the wells on leases the company acquired (J.A. A-107). He stated that he became "dissatisfied" with Miner *"during the process of getting a prospectus written up by legal counsel * * * which cost me ten thousand dollars"* (J.A. A-108). He then hired Kirk to replace Miner. Kirk was to locate, acquire and *"sell leases"* (J.A. *id.*).

Following Dahl's independent investigation of the properties (Pet. App. ¶ 25, p. a-35), Dahl loaned Pinter approxi-

mately $20,000 to acquire the subject leases "on the understanding that the leases were to be held in [Pinter's] name, with Dahl having a right of first refusal to drill one or more offset wells in the future" (Pet. App. a-32, ¶ 9). Dahl gave Pinter additional money to acquire an overriding royalty interest in one of the leases (*id.*).

Dahl testified at trial that he held the right of first refusal referenced by the trial court *"until I either funded the complete drilling of [the] wells or put up some money and other investors were involved and the money was funded and the well was drilled"* (Pet. App. a-32, ¶ 9; J.A. A-105). Although Dahl wanted to acquire a substantial portion of the five-well package suggested by Pinter, he *"did not have the type of money that it appeared would be necessary"* to complete the recommended program (J.A. A-105-106 or A-109). In his own words, he therefore "contacted Mr. [Robert] Gottsch", a feed-lot operator with whom he had previously invested as partners in an "oil deal", *"and explained to him about the property, and he was interested, and he came down, and got involved in this drilling"* (J.A. A-109). Dahl and Gottsch initially put up $363,000 (J.A. A-106), *all* of the working interest money for three of the five wells (J.A. A-106). The "completion money" put up in the name of Dahl and Gottsch was $140,000 (J.A. A-107). At Dahl's instigation and request, Gottsch "funded" his and Dahl's entire share of the drilling and completion costs for three of the five wells — approximately $500,000 (J.A. A-112).

Gottsch testified at trial in Dahl's behalf. When asked who was involved in the initial decision to go into business with Pinter, Gottsch had the following comments (J.A. A-113):

> A: [by Mr. Gottsch] I don't remember anyone else really being involved. If they were involved, I really didn't pay

> any attention to them, you know. I was going into business with Maurice [Dahl], and who he sent around was fine. I wasn't going to pay them any attention at all.
>
> Q: You relied on Mr. Dahl?
>
> A: Yes, sir.

The trial court's findings and the testimony of Dahl and Gottsch at trial fly directly in the face of the stated basis of the court of appeals' decision. Dahl had a clear financial interest in seeing his investment fully capitalized.

As has been seen, the two cardinal assumptions which form the basis for the court of appeals' decision, *i.e.*, (1) that Congress did not intend to impose liability upon sellers of unregistered securities absent a desire to receive a financial benefit, and (2) that Dahl was "merely gregarious" and expected no financial return out of the sales of interests to other investors, are incorrect.

As pointed out by Judge Jones, the Court need not decide whether gratuitous conduct might subject a person to liability because that issue is not present under these facts:

> I sympathize with the panel's evident concern regarding an overly-broad definition of "seller" lest a cocktail conversation should lead to unwarranted liability under section 12(1) of the 1933 Act. Dahl, however, was performing a role far more significant than that of "happy hour investment advisor." The policy behind the "substantial factor" test, unadulterated by the majority's gloss, is fully satisfied by holding Dahl a "seller." We need not speculate, therefore, on how a true coctail conversationalist might defend himself consistent with that test. [Pet. App. a-27.]

Judge Brown, dissenting from the majority opinion, put it this way:

> * * * [this] Court's finding that Dahl expected no financial benefit from his efforts has no basis in the record or common sense. More investors means that the investment program receives the requisite amount of financing at a smaller risk to each investor. Therefore, I cannot believe that Dahl was completely free of self-interest when he exhorted the other purchasers to invest. [Pet. App. a-18 at n. 3.]

E. AS BETWEEN TWO § 12(1) "SELLERS," CONTRIBUTION SHOULD BE AVAILABLE.

The panel majority did not discuss the fact that Dahl's Section 12(1) "seller" status is not asserted as grounds for proper application of the *in pari delicto* defense. As the "issuer", Pinter would normally be liable to Dahl, who either purchased from Pinter and resold or acted as an agent for both Pinter and the investors in the third-party transactions. The issue of Dahl's Section 12(1) status is incidental to the outcome of this case, except with regard to the issue of contribution.

If Dahl is a Section 12(1) "seller," Pinter would still be liable to the *other* purchasers, although Dahl might be held liable to Pinter in contribution as to their claims. As pointed out by Judge Brown, the results of this view are fair and equitable (Pet. App. a-23):

> Barring Dahl's recovery will not let Pinter off the hook because of the presence of the other plaintiffs who have already successfully litigated their claims against Pinter. Thus, allowing the *in pari delicto* defense to be used in this case results in the best possible outcome — both Dahl and Pinter must "pay" — that is, bear the burden — for the violation for which they are both

responsible. The best way to protect the public in this case is to discourage the actions of both Dahl and Pinter as well as future Dahls and Pinters.

Indeed, I would go further. I would hold that Pinter is entitled to contribution from Dahl since Dahl is at least equally culpable for the sale to the other plaintiffs.

II.

A PLAINTIFF WHO SEEKS DAMAGES UNDER § 12(1) SHOULD BE BARRED FROM RECOVERY UNDER THE COMMON LAW *IN PARI DELICTO* DOCTRINE WHERE (1) AS A DIRECT RESULT OF HIS OWN ACTIONS, HE BEARS AT LEAST SUBSTANTIALLY EQUAL RESPONSIBILITY FOR THE VIOLATIONS HE SEEKS TO REDRESS, AND (2) PRECLUSION OF SUIT WOULD NOT SIGNIFICANTLY INTERFERE WITH THE EFFECTIVE ENFORCEMENT OF THE SECURITIES LAWS AND PROTECTION OF THE INVESTMENT PUBLIC.

A. AS A DIRECT RESULT OF HIS OWN CONDUCT, DAHL BEARS AT LEAST SUBSTANTIALLY EQUAL RESPONSIBILITY FOR THE VIOLATION HE SEEKS TO REDRESS.

As this Court recently announced in B. *Eichler, H. Richards, Inc., v. Berner,* 105 S.Ct. 2622 (1985), a private action for damages brought under the securities laws will be barred on the grounds of the plaintiff's own culpability where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and the protection of the investing public.[3]

[3]Lower courts have recognized in the *in pari delicto* defense in '34 Act cases under circumstances where the fault of the parties is "clearly mutual, simultaneous, and relatively equal". See, *e.g., James v. Breuil,* 500 F.2d 155, (5th Cir. 1974). The Fifth Circuit has required that the effect on the investing public or regulatory scheme be so small as to permit the conclusion that allowing the defense would not interfere with regulatory objectives. Ancillary requirements have been imposed. *Woolf v. S. D. Kahn & Company,* 515 F.2d 591, 601 (5th Cir. 1975), *on rehearing* 521 F.2d 225 (5th Cir. 19785), *vacated* 426 U.S. 944 (1976) (defense allowed where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation; not every transgression bars suit and an unrelated conspiracy is insufficient); *Fogarty v. Security Trust Company,* 532 F.2d 1029, 1033 (5th Cir. 1976) (quoting *Woolf, infra,* to the effect that plaintiff's violations should be at least as serious as defendant's).

A proliferation of diffuse analysis exists on the proper standard for denying recovery upon the basis of peripheral material involvement in a securities transaction. See, *e.g.,* Cobine, *Elements of Liability and Actual Damages in Rule 10b-5 Actions,* 1972 U. Ill. L. F. 651, 666-67, n. 79 (1972) (*in pari delicto* defense should be denied where plaintiff's own breach was the cause of his loss); *Mallis v. Bankers Trust Company,* 615 F.2d 68, 76 (2nd Cir. 1980), *cert. denied,* 449 U.S. 1123 (1981) (no *in pari delicto* defense when alleged acts insufficiently relate to the statutory violation in issue), *Lawler v. Gilliam,* 569 F.2d 1283, 1292-94 (1978), *Pearlstein v. German,* 429 F.2d 1136 (2nd Cir. 1970); See also Branson *Collateral Participant Liability Under the Securities Laws — Charting the Proper Course,* 65 Oregon L.Rev. 327 (1986), Gabaldon, *Unclean Hands and Self-Inflicted Wounds: The Significance of Plaintiff Conduct in Actions for Misrepresentation Under Rule 10b-5,* 71 Minn.L.Rev. 317 (1986), Gibson, *Securities-Degermining Equal Fault Between Tippers and Tippees Under Rule 10b-5-Berner v. Lazzaro,* 730 F.2d 1319 (9th Cir. 1984), *aff'd sub nom. Bateman Eichler, Hill Richards, Inc. v. Berner, 105 S.Ct. 2622 (1985),* 569 Ariz.St.L.J. 569 (1985), Sachs, *The Relevance of Tort Law Doctrines to Rule 10b-5: Should Careless Plaintiffs be Denied Recovery?,* 71 Cornell L.Rev. 86 (1985), McDermett, *Liability for Aiding and Abetting Violations of Rule 10b-5: The Recklessness Standard in Civil Damage Actions* 62 Tex.L.Rev. 1087 (1984), Stern, *Potential Liability of Purchaser Representative,* 39 Business Lawyer 1815 (1984). Bell, *How to Bar an Uninnocent Investor — The Validity of Common Law Defenses to Private Actions Under the Securities Exchange Act of 1934,* 23 U. Fla.L.Rev. 1 (Fall, 1970), Harter and Ordower, *Rule 10b-5: The In Pari Delicto and Unclean Hands Defenses,* 58 Cal.L.Rev. 1149 (1970), Godfrey, *Plaintiff's Conduct as a Bar to Recovery Under the Securities Act: In Pari Delicto* 48 Tex.L.Rev. 181 (1969); Note, *Securities Regulation: Doctrines of In Pari Delicto and Unclean Hands Held to Bar 10b-5 Recovery by Tippee Against Corporate Insiders* 1969 Duke L.Rev. 832, 1969. Moldoff, *Annotation: Purchaser's Right to set up invalidity of contract because of violation of state securities regulation as affected by doctrines of estoppel or pari delicto* 84 ALR2d 479 1962 (*in pari delicto* should be used if a third party could sue plaintiff on the same proof that plaintiff uses against the defendant).

The factors of relative culpability examined by the Court in *Eichler* in light of the "deterrent incentive mixture" included the relative duties and sophistication of the parties to that action, the degree of initiative, knowledge and intent exhibited by each of them, and the range and type of violations committed. Each of these critical factors are present and work in Pinter's favor in this transaction:

1. *Relative degree of initiative.*

Dahl instigated the transaction which he seeks to redress, actively seeking out Pinter through the assistance of a full-time employee whose job was to find oil properties and investors. Dahl travelled from California to Oklahoma on several occasions, personally touring the properties, conducting his own investigation and playing the "bell cow" role in soliciting the investments from Gottsch, Grantham and the California plaintiffs. Without his active financial involvement and aggressive personal support, the project probably would not have gotten off the ground (see below).

2. *Extent of financial involvement.*

Dahl initially loaned Pinter $20,000 to warehouse the leases until investors could be found. Because he was not interested in drilling a well "heads up all by myself. I did not think that to be a wise decision" (J.A. A-109), Dahl contacted his investment partner, Robert Gottsch. Gottsch agreed to "go into business with Maurice" (J.A. A-109) and "funded" $500,000 to acquire all of the available working interest in three of the five wells, providing all of the drilling and completion money for each of the three. Subsequently he raised additional funds from the California investors. But for Dahl, who single-handedly accounted for approximately $600,000 of the total funds invested, it is doubtful that the five-well "program" could have been initiated. However, it is important to remember that Dahl *borrowed* most of the money he initially invested. Dahl had the *contacts*. *Gottsch* had the money.

3. *Awareness of the duty to register.*

While nothing in the record indicates whether Dahl was a participant in the decision not to register the securities in question, the record reflects that *Pinter*, in the words of the court of appeals, "probably misapprehended" (Pet. App. a-9) his duty to register and misunderstood his right to rely on the private offering exemption. The trial court held that the plaintiffs failed to establish *scienter* on the part of the defendants. In short, there is no evidence to suggest that Pinter acted knowingly in connection with the violations under discussion.

On the other hand, Dahl had filled out all of the contracts for each California investor. The contracts each stated that the securities were not registered; it is only reasonable to conclude that Dahl knew that the securities were not registered. He had previously become dissatisfied with an employee during the process of having a $10,000 prospectus written up by legal counsel (J.A. A-108). He had hired two full time employees to bring "investor money together" and drill wells (J.A. A-107-108). On the basis of these facts, Dahl was probably aware of the duty to register, contrary to the finding of the court of appeals.

4. *Communications with investors.*

Dahl was the exclusive conduit of information before, during and after the sale of the securities in question for all but one of the plaintiffs. The trial court found that all of the remaining plaintiffs invested because Dahl did so, and not because of any representations, acts or omissions on the part of Pinter.

5. *Reliance.*

The court found that the plaintiffs relied on Dahl, rather than Pinter, in making their decisions to invest. On the other hand, Dahl relied upon his own investigation rather than anything which Pinter said or did in making the decision to invest.

6. *Range of violations; absence of misrepresentations.*

The court found that Pinter engaged in no actionable misrepresentations, acts or omissions in violation of § 10(b) or Rule 10b-5. In addition, the court found that the plaintiffs had failed to prove *scienter*.

7. *Relative sophistication.*

Dahl was operating two oil companies at the time he became involved with Pinter, was actively seeking oil and gas opportunities and had hired two full-time employees to assist him in this regard. His net worth was in excess of $1,000,000 and his income approached $250,000. He acquired some interests in his own name, some in the name of his companies, "Puma Petroleum" and "Wrangler Oil," and some in the name of "Maurice Dahl or Assignee." He acted as lease warehouseman, investor, purchaser and "seller" in the transaction. He conducted his own investigation along with Kirk, his second full-time oil-field employee, whose job was to "find good leases to be drilled that had possibilities of production," having hired him because he "had quite a bit of prior knowledge in the business" (J.A. A-108).

8. *Relationship to other investors.*

While the trial court found that the other investors were "friends and family" of Dahl, most of them were business associates as well. The group included his personal accountant, business partner, banker and primary lender, former employers and employees, a construction company contractor, a subcontractor, his insurance agent, a corporation owned by a friend, and his girlfriend, Grantham (J.A. A-101-104). Except for Grantham, they never met Pinter and dealt only with Dahl.

9. *Direct relationship to offer, sale and delivery.*

Dahl's conduct was fundamental to the offer, sale and delivery of unregistered securities in this case, rather

than tangential or collateral. He contacted Gottsch and each of the remaining plaintiffs, introduced them to the opportunity, gave it his "blessing," helped them fill out the investment contracts, took their checks, and provided them with periodic progress reports and information. In short, Dahl was the primary conduit for both information and money in relation to the securities issued to these investors.

10. *Pecuniary benefit.*

Despite the court of appeals' ruling to the contrary, the trial court's findings lead to the inescapable conclusion that Dahl had a direct pecuniary interest in seeing his investment fully capitalized and in spreading the risk involved to others beside himself and his partner Gottsch (see, *e.g.*, Pet. App. a-9, at n. 3). Dahl clearly had an expectation of pecuniary benefit as a result of his sales to the other investors. He invested in each of the wells in which they participated (Pet. App. a-33, ¶ 13.) He brought in other investors because he "did not have the kind of money necessary" to complete Pinter's recommended program (J.A. A-105-106). In the words of Judge Brown, "I cannot believe Dahl was completely free of self interest when he exhorted the other purchasers to invest" (Pet. App. a-18, -19, at n. 3).

11. *Independent investigation.*

Finally, Dahl engaged in his own independent investigation prior to investing and prior to involving the other investors in the transaction, examining the geology, drilling logs, and production history before deciding to invest (Pet. App. a-32, ¶ 10).

In conclusion, Dahl was a preeminent factor in the sales. Without his involvement, the deal probably would not have gotten off the ground. As between Pinter and Dahl, the responsibility for causing these sales is substantially equal.

B. AS RECOGNIZED BY THIS COURT IN *EICHLER* AND *FROST*, THE *IN PARI DELICTO* DEFENSE APPLIES TO EXPRESS PRIVATE ACTIONS BROUGHT UNDER § 12(1) OF THE SECURITIES ACT OF 1933.

Less than ten years after enactment of the federal securities laws this Court held in *A. C. Frost & Co. v. Coeur d'Aline Mines Corp.*, 312 U.S. 38, 43 (1941) that an express private right of action for rescission of the sale of unregistered securities brought under the '33 Act could be barred on the grounds of the defendant's own culpability. Rejecting a corporation's attempt to bar investors' recovery by claiming that the transaction in which their securities were distributed violated the Act, Justice Reynolds stated on behalf of the Court:

> Courts have often added a sanction to those prescribed for an offense created by statute where the circumstances fairly indicated this would further the essential purpose of the enactment; but we think where the contrary definitely appears — actual hindrance indeed of that purpose — no such addition is permissible. The latter situation is beyond the reason which supports the doctrine now relied upon.
>
> Here the clear legislative purpose was protection of innocent purchasers of securities. They are given definite remedies inconsistent with the idea that every contract having relation to sales of unregistered shares is absolutely void; and to accept the conclusion reached by the Supreme Court below would probably seriously hinder rather than aid the real purpose of the statute. [312 U.S. at 43.]

The Court quoted approvingly from a memorandum filed by the Securities & Exchange Commission "by permission, * * * [as] pointing out how this purpose may be thwarted

and the investing public injured if the ruling below is approved" (312 U.S. at 43):

> The fundamental purpose of the Securities Act of 1933 * * * is to protect the investing public.* * *It is obvious that the purpose of the Act would be defeated by [affirmation] * * * It appears to us to be entirely immaterial whether in such a case, the agreement is labelled 'void' or 'in pari delicto.' There, lables, as often is the case, merely state the conclusion reached, but do not aid in solution of the problem. *The ultimate issue is whether the result in the particular case would effectuate or frustrate the Act.* [312 U.S. at 43, n. 2.] (Emphasis supplied.)

In two subsequent decisions this Court held that the securities laws are to be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes." *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

Interpreting the Investment Advisers Act of 1940, the Court in *Capital Gains* rejected the requirement of strict proof of traditional common law elements when to do so would undermine the manifest purpose of the securities laws:

> A fundamental purpose, common to these statutes, was to substitute a philosophy of full disclosure for that of *caveat emptor*, and thus to achieve the high standard of business ethics in the securities industry. * * *
>
> Congress intended the Investment Advisers Act of 1940 to be construed like other securities legislation 'enacted for the purpose of avoiding frauds,' not technically and restrictively, but flexibly to effectuate its remedial purposes. [375 U.S. at 186, 195.]

Shortly after *Capital Gains* and *Borak*, the Supreme Court addressed the availability of common law defenses to the strict liability provisions of the anti-trust statutes. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968). In *Perma Life* the Court held that *in pari delicto*, with its "complex scope, contents, and effects, should not be formally recognized as a defense to an anti-trust action." Id., at 140. However, Justice Black, speaking for the Court, went on to specify an alternative basis for barring an uninnocent plaintiff:

> Respondents, however, seek to support the judgment below on a considerably narrower ground. They picture petitioners as actively supporting the entire restrictive program as such, participating in its formulation and encouraging its continuation. We need not decide, however, whether such *truly complete involvement and participation* in a monopolistic scheme could ever be a basis, wholly apart from the idea of pari delicto, for barring plaintiff's cause of action, for in the present case the factual picture respondents attempt to paint is utterly refuted by the record. [392 U.S. 140; emphasis supplied.]

Just two Terms ago, this Court reaffirmed the holdings of *Perma Life* and *Frost* as applied to the securities laws by declaring that common law defenses could bar an implied right of action brought under § 10(b) of the Securities Exchange Act of 1934. *B. Eichler, H. Richards, Inc., v. Berner*, 105 S.Ct. 2622 (1985).

The Court granted certiorari in *Eichler* recognizing that while it had previously "sharply restricted the availability of the *in pari delicto* defense in antitrust actions, see *Perma Life*, * * * the lower courts have divided over the proper scope of the *in pari delicto* defense in securities litigation." (105 S.Ct. at 2626.) The trial court had dismissed the plaintiffs' claims for relief under the anti-fraud provisions of the

'34 Act on the basis that they were "tippees" who had admittedly traded on material inside information and were thus precluded from recovery. The Court affirmed the decision by the court of appeals to reverse, finding "no basis for concluding at this stage of the litigation that the respondents were *in pari delicto* * * *." (105 S.Ct. at 2631.)

In an opinion reminiscent of the "truly equal involvement and participation" language contained in *Perma Life*, the *Eichler* Court noted that while the respondents "may well have violated the securities laws," the actions of the defendants were "far more culpable under any reasonable view * * *." (*id.*). Examining the relative responsibility for the violations at hand in light of the regulatory purpose of the securities laws, the Court concluded that "*Absent other culpable actions* by a tippee that can be said to outweigh these violations by broker-dealers, we do not believe that the tippee properly can be characterized as being of substantially equal culpability as his tippers" (105 S.Ct. at 2631; emphasis supplied):

> Accordingly, a private action for damages in these circumstances may be barred on the grounds of the plaintiff's own culpability only where
>
> (1) as a direct result of his own action, the plaintiff bears substantially equal responsibility for the violation he seeks to redress, and
>
> (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public. [*Id.*]

The Court acknowledged, however, that tippees might well be denied recovery under appropriate circumstances:

> Although situations might well arise in which the relative culpabilities of the tippee and his insider source

might merit a different mix of deterrent incentives, we * * * conclude that in tipper - tippee situations such as the one before us the factors discussed above preclude recognition of the *in pari delicto* defense. [105 U.S. at 2632.]

C. THE *EICHLER* TEST APPLIES TO THE CASE AT BAR.

The district court in this case made no mention of the common-law defenses of illegality, estoppel, unclean hands and *in pari delicto*, despite facts that would clearly support their application. The court of appeals affirmed, rejecting the application of *Eichler* and of the *in pari delicto* defense to cases arising under § 12(1) of the '33 Act in reliance upon its own much earlier decision in *Henderson v. Hayden*, 461 F.2d 1069 (5th Cir. 1972):

> * * * If *Eichler* applies to a section 12(1) action as well as to a section 10(b) action, it appears that *Henderson* would no longer be valid precedent. * * *
>
> * * * By its own terms, the *Eichler* standard applies when 'damages [are sought to] be barred on the grounds of the plaintiff's own culpability,' *a condition not present under our facts. Eichler*, 472 U.S. at ___, 105 S.Ct. at 2629, 86 L.Ed. at 224. Additional evidence on *Eichler's* limited applicability lies in the fact that the second prong of *Eichler* substantially mirrors the classic formulation of the *in pari delicto* doctrine. [Pet. App. a-8, a-10; emphasis supplied.]

The court rejected the application of the *in pari delicto* defense as announced in *Eichler*, despite its determination that Dahl, against whom Pinter sought to apply numerous affirmative common law defenses, was an "equal producing cause" of the wrongs he sought to redress and "as 'culpable' " as Pinter for the illegal transaction (Pet. App. a-9).

The basis for the court's decision was a determination that Dahl, as one who had engaged in "seller" conduct, was nevertheless untainted by unclean hands:

> The law imposes no such presumption [of wrongdoing] on Dahl. *The issue in this case is not how the parties' legal relationship should be structured in order to give maximal effect to the two independent values undergirding the unclean hands doctrine and the federal securities laws.* In contrast to the unclean hands and *in pari delicto* defenses, the estoppel theory [sic] asserted by Pinter has no independent existence in principles of judicial integrity but arises exclusively from within the relationships that are regulated be federal statute. The issue then, is simply whether section 12(1), providing for a general right to rescind a sale of securities not registered in compliance with the 1933 Act, may, in the context of federal securities law, be fairly construed as applying only to purchasers who do not know their securities are unregistered. * * * [Pet. App. a-12.]

Per contra, the issue before the Court, and that which was briefed and argued below and at trial (Pet. App. a-21, at n. 4), and which the panel majority did not address, is whether the common law *in pari delicto* defense is available to bar a private action for rescission of the sale of unregistered securities brought under § 12(1).

In short, both the trial court and the Court of Appeals made findings of fact which invoke the application of this Court's recent ruling in *Eichler*. Nevertheless, both courts refused to resolve the issue. The trial court failed to mention the defense of *in pari delicto* or *Eichler*. The Court of Appeals, on the other hand, created an erroneous distinction in order to avoid *Eichler's* application.

D. PRECLUSION OF DAHL'S RECOVERY WILL NOT SIGNIFICANTLY INTERFERE WITH THE EFFECTIVE ENFORCEMENT OF THE SECURITIES LAWS.

Because as a direct result of his own actions Dahl was an "equal producing cause of the illegal transaction" (Pet. App. a-9) and thus bears at least "substantially equal responsibility for the violations he seeks to redress," the question which remains is whether, in light of the "deterrent incentive mixture," preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and the protection of the investment public.

In the first place, Dahl's *truly* equal role in the transaction at bar cannot be denied. Denying Dahl's right of recovery will not have a chilling effect on enforcement of the registration statutes through private litigation because it represents appropriate treatment under the law as it is and as it should be.

Dahl should not be allowed to avoid liability because his conduct in connection with the sales in question is exactly what the securities laws were designed to regulate. He was a knowing, willing, active and preeminent participant in violative conduct. Nor will denying Dahl the right to recover encourage violations of the law. Holding only Pinter liable would be less effective from the standpoint of deterrence than holding both responsible under the facts. The latter approach will go farther in promoting the regulatory purposes of the securities laws.

For example, Dahl's conduct in the instant case goes beyond that of the plaintiff whose recovery was allowed despite assertion of the defense in *Can-Am Petroleum Co. v. Beck*, 331 F.2d 371 (10th Cir. 1971). *Can-Am* involved similar allegations of violations of Section 12(1) of the '33 Act.

The defendants countered Beck's request for rescission by introducing proof that after she bought stock she became enthusiastic as to the merits of the investment and successfully persuaded others to purchase the offering, for which she received an additional block of stock. The trial court found that these efforts extended beyond personal investment but refused to deny her recovery, distinguishing the case from one in which a plaintiff would engage in conduct "equally culpable" with that of the defendants:

> Although the law is sometimes impatient with claims by parties to illegal contracts when made against each other it will always examine with care the total circumstances of the parties' association and particularly so when the public interest is involved in the enforcement of a statutory remedy. Here the claim is based upon the provisions of the Securities Act, the remedial aspects of which cannot be waived either directly or indirectly. 15 U.S.C. Sec. 77n; *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168. The purpose of the Act is to protect the naive or uninformed investor and to deny recourse to the reckless or fraudulent seller of securities. And thus, when the relationship of the parties is mixed, the judicial inquiry will concern itself with essentials in interpreting and enforcing the provisions of the Act. One who sells securities in violation of the Act will find no comfort in his own incidental investment when he seeks recovery against his equally culpable associates * * * . But an investor does not lose the shelter of the Act because he becomes to some extent involved in the illegality of the security sales. The reason for such rule has been aptly stated:
>
> > In such event, since the policy of the law designed to discourage illegal agreements comes in conflict with that policy that demands the effective enforcement of the Corporate Securities Act, the law differentiates the guilt of the parties, because refusal of relief to the less culpable would involve harmful

> effects wholly out of proportion to the requirements of individual punishment or the discouragement of illegal contracts. Williston on Contracts, 1938 Ed., vol. VI, pp. 5085, 5086, [Sec.] 1789. . . . 331 F.2d, at 373.

So viewed, the principal judgment entered by the trial court is not in error. Mrs. Beck was sought out as a potential investor and aid to Can-Am's plan to raise capital in violation of the Act. She became "sold" upon the merits of the investment through the company's misrepresentations and was pursuaded to buy * * *. Her relationship as a pure investor became adulterated when she actively assisted in selling others but she at no time had the degree of culpability attributed to defendants and should not be considered *in pari delicto.* [331 F.2d 371, 373-74.]

The proper application of the first prong of the *in pari delicto* test set forth in *Eichler* is illustrated by the reasoning in *Beck.* The Court should limit application of the defense to situations of truly equal responsibility, such as the one above.

Once equal responsibility has been established, the question the Court should ask in analyzing the policy issue before it is whether the party seeking to recover should be allowed to do so, despite his own responsibility for the wrongs he seeks to redress. In other words, which result will best serve the regulatory purpose of the securities laws? As stated in *Eichler,* "denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality" (*Eichler, supra,* 105 S. Ct. 2622, at 2626, 27).

Proper deterrent emphasis is the goal of decisions such as the one under discussion. Precluding Dahl from recovery in this case will result in proper deterrence, primarily because this outcome is the most appropriate for the parties to this suit. Dahl, and others who, like him, are guilty of

significant "seller" conduct constituting at least an "equal producing cause of the illegal transaction," should be denied relief. Pinter, who as the issuer bears the obligation to register, should be held liable to the remaining investors along with Dahl. Applying the *in pari delicto* defense produces these results.

In the words of Judge Brown,

> Barring Dahl's recovery will not let Pinter off the hook because of the presence of the other plaintiffs who have already successfully litigated their claim against Pinter. Thus, allowing the *in pari delicto* defense to be used in this case results in the best possible outcome - both Dahl and Pinter must "pay" - that is, bear the burden - for the violation for which they are both responsible. The best way to protect the public in this case is to discourage the actions of both Dahl and Pinter as well as future Dahls and Pinters. * * * [Pet. App. a-23.]

To deny Dahl recovery under the specific facts present in this case will supplement rather than hinder effective enforcement because it will encourage observance of the registration statutes. *Serzyko v. Chase Manhattan Bank,* 290 F. Supp. 74, 89 (D.C. S.D.N.Y. 1968). Dahl so made himself a part of the basic violation here that to allow him to recover would encourage similar "seller" conduct. He was the prime-mover, the catalyst and the motivating force behind the entire transaction. Such conduct should not be encouraged.

By the same token, if the California plaintiffs had sued Dahl, Pinter would be allowed to recover in contribution from Dahl.[4] His right to do so should not be subject to the will of other parties in the litigation, as here, where the California plaintiffs chose not to bring suit against Dahl. Pinter should be

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[4]See n.1, p. 6, *supra.*

able to assert Dahl's complicity. Liability should not be contingent upon one's party designation in the suit. Moreover, the motives behind a decision on the part of private litigants to effectively grant informal immunity from private prosecution to one who has violated the spirit and letter of the securities laws should not be assumed to be appropriate. The power to designate immunity from a regulatory framework intended to protect the public should not be left to private litigants, and certainly should not be subjected to the possibility of different outcomes because of titular party designations. Such an arbitrary result should not be allowed in view of the deterrent and compensatory purposes of the securities laws. The need for full and fair disclosure, protection of the investing public and full compensation of the victims of such violations dictates a more homogeneous result.

E. DAHL IS BARRED FROM RECOVERY FROM PINTER UNDER THE TEXAS ACT BY HIS OWN WRONGFUL CONDUCT.

In Texas, if transactions are illegal solely because the stock in question is not registered, a plaintiff who joins in with defendants in the offer, sale or delivery of unregistered securities knowing that the securities in question are unregistered is equally culpable with other sellers, in accordance with the common law doctrine of *in pari delicto. Ladd vs. Knowles,* 505 S.W. 2nd 662, 668 (Tex.Civ.App. 1974). Here the securities, which Dahl filled out for the other investors, clearly stated that they were unregistered. Under the circumstances of this case, it was error for the court of appeals to hold Pinter liable to Dahl under the Texas Act for the sale of unregistered securities.

F. PINTER IS ENTITLED TO CONTRIBUTION TO DAHL AS TO THE CLAIMS OF THE REMAINING PLAINTIFFS.

Finally, one standing in Pinter's position should be able to obtain contribution from another joint tortfeasor such as Dahl. *Kuehnart v. Textar Corp.*, 412 F.2d 700, 705 at n. 7 (1969) (dictum). Equal fault should be borne equally. Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding And Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution,* 120 U. Penn. L. Rev. 597, 647-51 (1972).

CONCLUSION

The judgment of the trial court and of the court of appeals should be reversed as to the Respondent, Maurice Dahl, and Dahl should be held liable in contribution to Pinter.

Respectfully submitted,
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CERTIFICATE OF SERVICE

This will certify that three true and correct copies of the foregoing Petitioner's Brief on the Merits have been sent, by certified mail return receipt requested, to attorney of record, Michael F. Linz, 400 Katy Building, Dallas, Texas 75202 and to counsel for respondents, John A. Spinuzzi, Box 50958, Denton, Texas 76206.

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RESPONDENT'S

BRIEF

NO. 86-805

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BILLY J. "B. J." PINTER, *et al.*,

Petitioners

v.

MAURICE DAHL, *et al.*,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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October 19, 1987

QUESTIONS PRESENTED

Section 12(1), Securities Act of 1933, provides a private right of action to a purchaser of securities sold in violation of Section 5 of the Act. Section 5 provides that it is unlawful to offer, sell, or deliver after sale, any security by means of the mails or instrumentalities of interstate commerce, unless those securities have been registered under that Act. Section 4(2) and Rule 146 (17 C.F.R. 230.146) provide for an exemption from the registration provisions of that Act in transactions not involving any public offering.

The questions presented by Petitioner, here restated, are:

Where a purchaser seeks relief under §12(1) against the issuer who sold him unregistered securities in violation of §5 may such claim be barred by the defense of in pari delicto where the sole wrongdoing was the purchaser had actual or constuctive knowledge that the securities were unregistered.

Where a purchaser seeks relief under §12(1) against the issuer who sold him unregistered securities in violation of §5 may such claim be barred by the defense of in pari delicto where the issuer asserts the wrongful conduct of that purchaser was that such purchaser became a wrongful "seller" when, at the instigation of the issuer, he gratuitously informed his family and friends about the opportunity to buy such securities from the issuer.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Statutes

Page

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

BILLY J. "B. J." PINTER, et al., Petitioners

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MAURICE DAHL, Respondent

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

Respondent adopts Petitioner's recitation concerning the opinions rendered by the trial court and Court of Appeals.

JURISDICTION

Respondent adopts Petitioner's statement regarding jurisdiction, subject to Respondent's continued

assertion that the defense of in pari delicto, as here raised, and a claim of right to contribution from Dahl, were not raised in the trial court. Those defenses were first raised on appeal to the Court of Appeals for the Fifth Circuit.

STATUTES AND REGULATIONS INVOLVED

1. Section 12(1), Securities Act of 1933, 15 U.S.C. §77 1(1):

> "Any person who offers or sells a security in violation of Section 5 [15 U.S.C. §77e] . . . shall be liable to the person purchasing such security from him, who may sue either in law or in equity . . . to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

2. Section 5(a), Securities Act of 1933, 15 U.S.C. §77e(a):

> "Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly -
>
> (1) to make use of any means or instruments of transportation in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale."

3. Section 4(2), Securities Act of 1933, 15 U.S.C. §77d(2):

> "The provisions of section 5 shall not apply to -
>
> * * *
>
> (2) transactions by an issuer not involving any public offering."

4. Section 15, Securities Act of 1933, 15 U.S.C. §77o:

> "Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under Section 12, . . . shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist."

5. Section 33A(1), Texas Securities Act, Vernon's Annotated Revised Civil Statutes (VARCS), Sec. 581-33A(1), Liability of Sellers - Registration and Related Violations:

"A person who offers or sells a security in violation of Section 7 . . . 9, 12, 23B . . . is liable to the person buying the security from him, who may sue either at law or in equity for rescission or for damages if the buyer no longer owns the security."

6. Section 33F., Texas Securities Act, VARCS, Sec. 581-33F. Liability of Control Persons and Aiders:

"(1) A person who directly or indirectly controls a seller, buyer, or issuer of a security is liable under Section 33A . . . jointly and severally with the seller, buyer, or issuer, and to the same extent as if he were the seller, buyer, or issuer, unless the controlling person sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of facts by reason of which the liability is alleged to exist.

"(2) A person who directly or indirectly with intent to deceive or defraud or with reckless disregard for the truth or the law materially aids a seller, buyer, or issuer of a security is liable under Section 33A . . . jointly and severally with the seller, buyer, or issuer, and to the same extent as if he were the seller, buyer, or issuer.

"(3) There is contribution as in cases of contract among the several persons so liable."

7. Section 12, Texas Securities Act, VARCS, Sec. 581-12:

" * * * No salesman or agent shall, in behalf of any dealer, sell, offer for sale, or make sale of any securities within the state unless registered as a salesman or agent of a registered dealer under the provisions of this Act."

8. S.E.C. Rule 146, 17 C.F.R. 230.146, relates to the role promulgated by the S.E.C., known as a rule of 'safe harbour' under the non-public offering exemption provided by §4(2), Securities Act of 1933, when all pre-conditions of the rule have been met by the issuer/offerer/seller.[1]

STATEMENT[2]

This appeal concerns the trial court's judgment granting plaintiffs recission of their purchase of

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[1]Due to its extreme length this rule is set forth in the appendix to Respondent's Brief in Opposition to the Petition For Writ of Certiorari at P.a-53. Effective April 15, 1982 Rule 146 was superceded by Regulation D. Rule 146 is located in 2 CCH Federal Securities Law Reporter ¶5718B.

[2]Because of the recommendation in the amicus curiai brief that the case be remanded for further findings as to Dahl's status as a possible promoter, this Statement is extensive as to facts extracted from the transcript of the record at trial. Appellee believes this appeal may be determined without remand for further findings.

securities from Pinter[3] pursuant to §12(1), Securities Act of 1933.[4] The securities involved were "fractional undivided oil and gas interests." Defendant raised eighteen affirmative defenses and also counterclaimed[5] against Dahl by alleging common law fraud by means of misrepresentations and omissions of Dahl which induced Defendant to sell the involved securities, and which induced Defendant to permit Dahl to sell the

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[3]Eleven plaintiffs were California residents; one plaintiff (Grantham) was a Texas resident. This appeal is only as to the judgment in favor of Maurice Dahl ("Dahl"). Pinter d/b/a Black Gold Oil Company is the only real defendant.

[4]The suit alleged violations of §12(1), §12(2), Securities Act of 1933, and §10(b) and Rule 10b-5, Securities Exchange Act of 1934 and regulations thereunder. In addition to these federal claims, comparable claims were made under the blue sky laws of Texas and California. Recission was granted pursuant to §12(1), Securities Act of 1933, and pursuant to Art. 581-33(A),(D), Tex.Rev.Civ.Stat. The trial court denied relief under 10b-5 due to plaintiffs' failure to establish scienter and reliance. The trial court did not rule on the §12(2) claim nor upon other pending claims for the stated reason that it was unnecessary because it was granting judgment under §12(1) and under Art. 581-33(A),(D).

[5]See Joint Appendix, A-7 for the Complaint, A-66 for the Affirmative Defenses and A-69 for the Defendant's Counterclaims.

securities (and to receive an alleged commission of $38,000), to the other plaintiffs.

Pinter's appeal was grounded upon three propositions; (1) Dahl should be barred from recovering damages because of Dahl's own wrongful conduct (estoppel); (2) Dahl was of equal fault, in pari delicto, with Pinter in violating the statute prohibiting the offer and sale of unregistered securities; and (3) as a joint tort feasor Dahl should be liable in contribution to Pinter in making the other plaintiffs whole. Pinter's argument revolves around the established fact that Pinter had direct pre-investment contact and communications only with Dahl and Grantham and that only Dahl had direct pre-investment contact with the other California investors. Pinter contends Dahl is an "equal fault seller" (i.e. a co-seller) of such securities to the other plaintiffs and that all claims of Dahl relating to his purchases of unregistered securities from Pinter, including Dahl's claims which are unrelated to the securities in which the California plaintiffs invested, should be barred.

1. Overview of Facts:

In 1980 Dahl was engaged in the construction and sale of residences in California. He also had direct investments in other types of business, including two bad oil and gas investments and had jointly drilled a well with his partner, Bob Gottsch. Dahl was actively looking for business opportunities in the oil and gas industry and was seeking to buy and sell mineral leases. Dahl met Pinter, an oil and gas operator who had sold oil and gas investments for twenty years as a Texas-licensed securities dealer. In December 1980 Dahl loaned $38,000 to Pinter who wanted to purchase and did purchase three mineral leases - - the Clark-Watkins-Clark leases - - with Pinter's agreement that Dahl would have the option and right to participate as an investor in drilling and developing those leases. Dahl's first investment with Pinter was the purchase of an overriding royalty interest in the two Clark leases for $15,000. In March 1981 Dahl made his next investments with Pinter in purchasing a 3/8 working interest in the Emanuel Clark 1-B well ($57,500), the Walter Clark 1-C well ($101,000) and the Watkins 1-A well ($93,000).

Before he met Dahl, Pinter, as the owner of the Doss lease and the Antwine lease, had fractionated and sold interests in three wells upon those leases. Before meeting Dahl, Pinter had also drilled two wells upon the Doss lease (Doss 1-B and Doss 2-B wells) and had drilled one well upon the Antwine lease (Antwine 1-C). In March 1981 Pinter was in the process of raising investment capital to drill two new wells, the Doss 3-B and the Antwine 2-C, which were to be offset wells to those previously drilled upon those two leases. The Doss and Antwine leases were adjacent to each other; they also were near to (about 1-1/2 miles) and in between the Watkins lease and the Clark leases. After Dahl had invested in the Clark-Watkins-Clark wells, Pinter told Dahl some of his investors had dropped out of the two ventures relating to the Doss 3-B well and the Antwine 2-C well. Dahl told Pinter that he and some of his friends might be interested in participating in those two ventures. Pinter gave Dahl subscription agreements to be signed by Dahl and any friend of Dahl who wanted to participate in the

Doss 3-B and Antwine 2-C wells. Upon his return to California Dahl enthusiastically told some of his family, friends and associates about Pinter and his (Dahl's) substantial investments with Pinter. As a result of Dahl telling his friends and business associates about this investment opportunity all the California investor-plaintiffs decided to participate in the working interest ownership in either the proposed Doss 3-B or Antwine 2-C well.[6] Their investment checks were payable to Black Gold. Some of the checks and subscription agreements were mailed to Pinter by these new California investors and some were carried by Dahl, as custodian, to Pinter. The remaining investors in the Doss 3-B and the Antwine 2-C were either former investors of Pinter or new investors who met Pinter through sources other than Dahl; as an example, H. B.

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[6]The ten California investors who invested with Pinter were Dahl's brother, Dahl's accountant, Dahl's partner in the construction business, Dahl's bank officer handling construction loans, Dahl's financier in the construction business,Dahl's construction business insurance agent, and several businessmen Dahl had known since they were in grammar school together. None of them knew each other, but all knew Dahl.

Adams, a new investor with Pinter and a non-party witness for plaintiffs, invested in both of these new wells. Grantham, a Texas resident who was then Dahl's fiance, also invested in the Doss 3-B and in the Antwine 2-C. Dahl testified each of these persons invested primarily because of Dahl's substantial personal investments with Pinter and because Dahl thought it was a "good deal". Excluding Dahl, none of the California investors personally met or talked with Pinter prior to investing. In the eyes of the trial court, Dahl's enthusiastic discussions about Pinter and his investment opportunities constituted a form of solicitation of them by Dahl.

2. S.E.C. Rule 146 and Alleged Exemption From Registration:

(a) Usage and Alleged Reliance on Rule 146: Pinter used the same form of subscription agreement for all his investors[7] Pinter included the following paragraph in all his forms of Subscription Agreement:

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[7]Tr. IX (i.e. trial transcript volume IX) P.560 L.9-P.561 L.4; P.562 L.5-9.

> "WHEREAS the parties constitute a predetermined and limited group of sophisticated and knowledgeable well informed investors who desire to arrange for participation in an oil and/or gas drilling venture as an investment and do declare that it is not for the purpose of reselling their interest therein. (These participating interests are being sold without the benefit of registration under the Securities Act of 1933, as amended, and on [sic] reliance of rule 146 thereunder)." [Emphasis supplied] [8]

Pinter testified the term "well informed" means the investors knew the risks of the oil business; that "predetermined group" meant the investors were "predetermined by numbers . . . [with] under 35 participants in an offering";[9] and that Rule 146 meant that everyone who received an offering was to be a "sophisticated" investor.[10] Pinter could not remember

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[8]The complete text of the Subscription Agreement is set forth in the Joint Appendix at A-95. The Subscription Agreement contained a table identifying the prices to be paid for various fractions of the working interest to (a) drill and test the well and to (b) complete and equip the well. The investor had to select information from the table and fill in the appropriate blanks in the Subscription Agreement as to what amount he was purchasing. Additionally, the investor had to fill in the blanks as to his name and address.

[9]Tr. IX P.561 L.6-10; P.562 L.10-20

[10]Tr. VIII P.342 L.17-P.343 L.17

if he had ever filled out a Form 146,[11] did not know what Form 146 contained or required and stated this form was to be filed with the Texas Securities Commission in Austin, Texas.[12] Pinter's testimony, compared with a reading of Rule 146, evidence Pinter had no knowledge of the requirements of Rule 146 and did not comply with <u>any</u> of the conditions of that Rule; therefore, he was not entitled to 'rely' upon Rule 146. Although Pinter already had investors who resided in Texas, Idaho, Nebraska, New York, Louisiana and New Jersey,[13] Pinter had never obtained advice that he could sell securities in interstate commerce, in California or in any other state, because he never thought he would be selling anything in other states.[14]

(b) <u>Pinter's Source of Investors:</u> Apparently Pinter generally obtained his investors through other investors.

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[11]TR. VIII P.344 L.21-25

[12]Tr. VIII P.345 L.1-P.346 L.2. The Rule required that the person claiming the exemption shall file Form 146 in the local regional office of the S.E.C. (the Fort Worth, Texas Regional Office) "at the time of the first sale . . . in any offering effected in reliance on this rule . . . ." Reg. §230.146(i).

[13]Tr. IX P.558-559

[14]Tr. IV P.558 L.6-19

Someone working with Pinter contacted some Boise, Idaho residents who became investors with Pinter; these investors in turn telephoned Mr. Shillington to determine if he was interested in investing in a Pinter oil deal. Shillington was and did.[15] Shillington later brought Tom Kalange of Twin Falls, Idaho in as an investor.[16] H. B. Adams became an investor with Pinter through a solicitation by an employee of Pinter, Geral Owen, which employee had previously worked for Adams.[17] Pinter promised to pay Geral Owen a commission for bringing in Adams.[18] Dahl met Pinter through Dahl's employee, Dean Kirk, who was a good friend of Pinter. Excluding Grantham,[19] all the remaining plaintiffs learned of the investment opportunity only through Dahl and through the

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[15]Tr. VII P.5 L.16-P.6 L.13. Shillington was an investor-witness for Pinter.

[16]Tr. VII P.17 L.1-4. Kalange was an investor-witness for Pinter.

[17]Tr. VII P.30 L.17-P.31 L.1. Adams' first and only investments were in the Doss 3-B and the Antwine 2-C. Although he was a witness for Plaintiffs Adams met Dahl after commencement of this lawsuit.

[18]Tr. IX P.562 L.21-P.563 L.14

[19]Tr. V. P.19.

Subscription Agreement and Wilcox Sand Report provided by Pinter.[20]

(c) Pinter's Lack of Inquiry Concerning Prospective Investors' Business and Financial Background. Pinter never inquired of Grantham or Dahl as to their financial condition, investment experience or ability to afford the involved financial risk of investment.[21] In the same manner Pinter never made any inquiry as to the business background, financial condition or other personal business affairs of Gottsch,[22] Adams[23] or Kalange.[24]

(d) Disclosure: Pinter's Delivery or Non-delivery to Plaintiffs of Written Information Concerning the Offering. Pinter testified that the only written

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[20]Tr. V P.106 L.1-9; P.119.

[21]Tr. VII P.63 L.6-19. Grantham was earning $28,000 per year as a sales representative for Cory Foods. Tr. VII p.62 l. 12-25. Dahl had a net worth of about $1,000,000 in 1980 before his divorce; his net worth was reduced to $500,000 after his property settlement with his wife. Tr. V P.159 L.16-23. During 1979-1981 Dahl had some disastrous business years, lost large sums of money, and he thought he was going bankrupt. Tr. V P.163 L.1-12.

[22]Tr. V. P.205-206.

[23]Tr. IX P.642 L.12-P.643 L.15.

[24]Tr. VII P.21 L.3-8.

information he gave to Dahl and Gottsch before their investments in the three proposed wells on the Clark-Watkins-Clark leases were the three Subscription Agreements for those three wells.[25] Pinter denied giving Dahl the Wilcox Sand Report before the Dahl/Gottsch investment in the Clark-Watkins-Clark wells and denied giving them the information in Plaintiffs' Exhibits 1 and 2.[26] Dahl testified he and Gottsch were given such Report prior to their investment and that such Report was false.

Pinter testified the Wilcox Sand Report was his geology report which he compiled in preparation for drilling the Doss 1-B, the first well drilled on the Doss lease; that such report did not apply to Clark-Watkins-Clark wells; that the only thing he gave Dahl to show to the California plaintiff-investors was his field copy

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[25]Tr. IX P.587 L.11-14; P.559 L.19-P.560 L.8; P.515 L.1-12; P.516 L.7-9.

[26]Tr. IX P.517 L.23-P.518 L.2; the Wilcox Sand Report is PX-7. Dahl testified he did receive these documents from Pinter and that they were false. Gottsch received copies of PX-1, PX-2 and PX-3 from Dahl before they invested in these wells. Tr. V P.79 L.16-25; P.83 L.3-16.

of that same Wilcox Sand Report with a map and drillers' logs attached;[27] that such Report was not prepared for or to be used concerning the merits of the Doss 3-B or the Antwine 3-C wells;[28] that the Report was given to Dahl merely to aid Dahl in discussing the general area around the proposed Doss 3-B and Antwine 2-C wells and to show the California prospects where the wells would be located but that such Report was not for an "endorsement" of those two wells;[29] and that Report did not apply to the Antwine lease, which Pinter "could not endorse."[30] Yet Pinter testified that the written material he gave Shillington and other persons who invested in the Doss 3-B was "a little more complete report" than what he gave Dahl for the California investors.[31] Pinter did not give Dahl any written information concerning then

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[27]Tr. VIII P.342 L.17-P.343 L.17. Pinter also gave Dahl the Subscription Agreements to give to the prospective California investors.

[28]Tr. VIII P.519 L.3-P.520 L.4; P.521 L.3-10.

[29]Tr. VIII P.522 L.6-12; IX P.523 L.24-P.524 L.15.

[30]Tr. VII P.105 L.12-25.

[31]Tr. VIII P.343 L.14-18.

current production; all statements concerning production were oral.[32]

(e) Disclosure: Pinter's Financial Condition, Income from Production and Personal Background. Pinter testified he did not give to Dahl (or to any other plaintiff) his financial statement nor any statement of his volume of, and income from, production nor any data concerning his personal background. Dahl testified that Pinter did give him such information and that it was false.[33] Pinter looked prosperous because he wore gold and diamond jewelry around his neck and on each hand, even when he was wearing work clothes in the oil field.[34] Dahl testified Pinter had shown Dahl his (Pinter's) financial statement in the first quarter of 1981 but did not give Dahl a written copy until July 1981 after Pinter updated those financials with information concerning the five wells in which plaintiffs invested.[35] Pinter did not know how Dahl

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[32]Tr. V P.80 L.1-18.
[33]The disputed data is contained in PX-10.
[34]Tr. VII P.55-56.
[35]Tr. V P.129 L.20-P.130 L.23.

obtained such data[36] from Pinter's office. Pinter testified such financial statement and statement of income from production were prepared by him for submission to the Oklahoma Corporation Commission and is Pinter's "estimate of [my] net worth as it means to [me] and has nothing to do with [my] real net worth" and was not used for investors.[37]

Pinter's financial statements were misstated in that the value of certain old stripper wells were based upon what Pinter estimated would be their replacement cost "at today's prices" in acquiring the leases, drilling, completing and putting on new equipment.[38] Pinter further acknowledged that his financial statements also misstated Pinter's daily, monthly and annual production, misstated income from production and misstated the corresponding asset value for such production.[39] Pinter's ownership interest in various

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[36]PX10 concerning Pinter's financial condition, production income, educational and business background. Tr. VIII P.519 L.3-P.520 L.4.
[37]Tr. VIII P.322 L.2-21.
[38]Tr. VIII P.319 L.7-P.320 L.3; P.326 L.15-P.317 L.25.
[39]Tr. VIII P.314 L.16-P.316 L.25.

wells averaged approximately 25% of the working interest. The first financial statement Pinter showed Dahl reflected Pinter's ownership interest was allegedly producing hundreds of barrels of oil per day and thousands of cubic feet of gas per day; this also was a misstatement. Dahl was impressed with the financial statements Pinter showed him, particularly their valuation of, and the amount of, oil and gas production which represented Pinter's interest as having asset value of $11,000,000 based solely upon his annual production.[40] The financial statements gave substance to Pinter's credibility, and Dahl was interested in dealing with someone that was successful, which in turn would give Dahl some "advantage of being successful" as an oil and gas investor.[41] The production data in Pinter's financials gave credence to Pinter's oral statements that because of his background and experience he could successfully complete wells where other persons could not and that his success ratio was

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[40]Tr. V P.72 L.1-9; P.73 L.12-P.74 L.23.
[41]Tr. V p.74 L.9; p.71 l.12-25.

80% in obtaining commercial producers, i.e. a well Pinter said would "pay out" the capital investment in one year.[42] The second financial statement, as updated in July 1981, was given to Dahl by Pinter and was even more impressive than the first financial statement because it reflected the asset value of Pinter's interest in the five wells recently drilled by Pinter and in which Dahl had invested; i.e. the three wells upon the Clark-Watkins-Clark leases and the Doss 3-B, Antwine 2-C. Yet this financial statement misstated facts because it reflected Pinter was receiving for his ownership interest in wells (25% working interest) 613 barrels of oil per day (18,500 bbls. per month) and 81,000,000 cubic feet of gas per day.[43] Pinter said this was an error and it should have stated 613 barrels of oil production per month, but he did not explain the misstatement as to gas production.[44]

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[42]Tr. V P.68 L.6-13; VI P.57 L.12-25; V P.69 L.11-P.70 L.6.
[43]Tr. V P.133 L.3-19.
[44]Tr. VIII P.310 L.13-20; P.326 L.15-P.327 L.25.

3. Dahl-Gottsch Relationship with Pinter: Dahl and Gottsch had been partners in the ownership, care and maintenance of cattle in Nebraska.[45] Later when the McFarland lease, located in Texas, was obtained by Dahl, Gottsch and Dahl drilled a well on a 50-50 basis; this was a handshake deal between Gottsch and Dahl, and Gottsch trusted and relied upon Dahl. This was Gottsch's first experience in an oil investment and was Dahl's first attempt at drilling a well for himself.[46] In completing and equipping this McFarland well, Kirk called in and obtained advice from his close friend, Pinter; this is how Dahl met Pinter.[47]

Pinter told Dahl that the best area for oil production was where Pinter was drilling in Oklahoma, that three leases in Pinter's area (being the Clark-Watkins-Clark leases) were the best Pinter had seen in 19 years.[48] Pinter later contacted Dahl and told Dahl the Clark-Watkins-Clark leases were available, and if Dahl would

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[45]Tr. V P.17.
[46]Tr. V P.16, P.188-189.
[47]Tr. V P.19.
[48]Tr. V p.37.

advance or loan the $38,000 for Pinter to buy those leases then Dahl could have the option and right of first of refusal to invest in wells to be drilled upon those leases. Pinter gave Dahl a Wilcox Sand Report, which report was discussed by Dahl and Pinter.[49] Dahl did not know anything about the oil business other than it had the possibility of making money;[50] Dahl concluded there was no way he could lose.[51] Dahl was very eager to put up the $38,000 for Pinter to purchase the Clark-Watkins-Clark leases in exchange for which Dahl would have the privilege of being able to be an investor in and a part of such quality wells.[52] Dahl then contacted Gottsch concerning this "opportunity", and Gottsch and Dahl met with Pinter in Oklahoma and viewed the Clark-Watkins-Clark leases. Gottsch testified he was not relying on Dahl in the Clark-Watkins-Clark deal but was relying upon

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[49]Tr. V P.23 L.1-4, L.14-15; P.24 L. 10-17; P.27 L.5-10; P.46 L.2-P.47 L.6.
[50]Tr V P.63 L.6-10.
[51]Tr. V P.37 L.15-25.
[52]Tr. V P.30 L.1-25; P.31 L.1-4.

Pinter's judgment and word[53] - particularly Pinter's word that the proposed three wells were a "lucrative deal", each well would produce 30-250 barrels of oil per day and would return Gottsch's investment capital (the "pay out") in a maximum of one to two years, and that the adjoining waterflood would benefit production from these leases. Gottsch concluded it was a "no-loss" deal.[54] Dahl made an agreement with Gottsch to loan Dahl his share of the money to invest in these three wells; Dahl signed a promissory note on March 2, 1981 and secured that loan with a deed of trust to various Dahl properties.[55] Gottsch bank-wired his and Dahl's investment funds to Pinter in two installments - the first installment for drilling and testing the wells and the second installment for completing and equipping the wells.[56] Dahl repaid Gottsch for such loan.[57]

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[53]Tr. VI P.236 L.12-14.
[54]TR. VI P.205 L.5-25; P.207 L.8- P.1-8 L.5.
[55]TR. VII P.41 L.14-21; Plaintiff's Exhibits 46 & 47.
[56]Tr. VII P.203-211.
[57]Tr. VII P.215 L.1-16.

Although these three wells had not produced any oil or gas, in October 1982 Pinter offered Gottsch and Dahl to invest $250,000 in each of three wells to offset these first wells drilled.[58] Gottsch and Dahl declined.

4. Dahl's Acts and Conduct Relating to His Co-plaintiffs' Investments. Dahl had told Pinter that he and some of his friends had been successful in the past and that if Dahl could find an investment in which he felt confident then some of Dahl's friends would like to invest.[59] In March 1980, immediately after Dahl and Gottsch agreed to invest in the Clark-Watkins-Clark wells, Dahl was given the "opportunity" to participate as an investor in the Doss 3-B and in the Antwine 2-C wells when Pinter advised him that several of his existing investors would be unable to invest in those two wells which were to be drilled as offsets to three existing wells allegedly producing 30-35 barrels

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[58]Tr. X P.628 L. 13-P.629 L.11; P. 630 L.3-8;Plaintiff's Exhibit 50; P.634 L.24-P.635 L.6; Tr. V P.140 L.19-P.141 L.14.
[59]Tr. V P.143-144.

of oil per day.[60] Dahl felt "it was more or less a 'slam dunk' to be able to invest in that type of offsetting production", and Dahl "had never had an opportunity to invest in something like that."[61] Dahl testified

> "[I] . . . indicated that these people would be very receptive if I gave my blessing on something I said I had investigated . . . . * * * I informed these people [the California investors] I had been to the property, looked at it, investigated it thoroughly, I was working with somebody competent, [who] had many years in the oil and gas business, and I thought this was an opportunity that would be fairly safe and would be successful."[62]

Dahl's sole purpose in telling his personal friends and associates was to give them an opportunity to share in something good.[63] None of the California investors knew each other, although each of them knew Dahl.[64] None of the California investors had any previous investments in oil and gas.[65] Dahl used Pinter's

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[60]Tr, VIII P.522 L.13-20; X P.647 L.7-13; Tr V P.37 L.15-P.38 L.7; P.95 L.3-16; P.49 L.1-3,6.
[61]Tr. V P.49 L.12-19; P.39 L.1-14.
[62]Tr. V P.144 L.3-10.
[63]Tr. V P.142 L.19-P.143 L.25.
[64]Tr. VI P.44.
[65]Tr. V P.144 L.18-P.145 L.23; P.146 L.1-4.

"Wilcox Sand Report" that Pinter had given him to discuss with the California investors the proposed Doss 3-B and Antwine 2-C wells. Pinter also gave Dahl Subscription Agreements for his friends to sign if they invested. These subscription agreement forms had blanks to be filled in as to the investor's name, address, fractional interest being purchased and the amount being paid for that interest - the last two to be determined from a price-unit table in the Subscription Agreement. Dahl helped most of the California investors by filling in the blanks with their names, addresses and interests being purchased.[66]

5. Purchasers of Interests in the Doss 3-B and Antwine 2-C. All plaintiffs were investors in these two wells:

(a) Doss 3-B: Dahl purchased a 7/64 working interest for $25,025. Grantham purchased a 1/64 working interest for $3,525. Heller, a California investor plaintiff, purchased a 2/64 working interest for $7,150.[67] Lund, Dahl's friend who resided in London,

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[66]Tr. V p.281 l.23-p.282 l.3.
[67]Trial Court's Memorandum Decision, F.F. 12,13.

England purchased a 2/64 working interest for $7,150. All other persons who acquired the remaining 52/64 working interest in the Doss 3-B were unknown to Dahl. In addition to these remaining fractional working interests, Pinter also sold fractional royalty interests in the Doss 3-B to at least five other persons.[68]

(b) Antwine 2-C: Dahl purchased a 5/64 working interest for $18,700. Grantham purchased a 1/64 working interest for $3,740. The remaining nine California investor-plaintiffs each purchased a 2/64 working interest for $7,480, aggregating 18/64 for $67,320. The remaining 40/64 working interests in this well were sold by Pinter to persons unknown to Dahl.[69]

6. Dahl's Relationship With Pinter/Black Gold The only agreements of any kind or nature between Dahl and Pinter are those set forth in the five Subscription

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[68]Tr. X P.640 L.19-P.641 L.15.

[69]The trial record does not identify all investors in any of the wells upon the Doss lease or the Antwine lease; the Doss 1-B, the Doss 2-B, the Doss 3-B, and Antwine 1-C and the Antwine 2-C. The Doss 3-B produced and sold oil. The Antwine 2-C never was completed and did not produce. Tr. V P.140 L19-P.141 L.14; VI P.68 L5-9.

Agreements that Dahl executed when he made his investments.[70] Dahl was merely an investor and had no decision-making authority as to where the wells were to be drilled or any usage of investor's proceeds nor did he have any authority to handle or disburse investment proceeds or deal with Pinter's bank accounts.[71] Dahl's only responsibility was as a custodian on behalf of some of the investor-plaintiffs in delivering to Pinter their executed subscription agreements and investment checks payable to Black Gold Oil Company. Other plaintiff-investors directly mailed their subscriptions and checks to Pinter. Pinter had complete control over the investment monies of the investor-plaintiffs.[72] In no manner did Dahl dictate the financial or business affairs of Pinter, nor did Pinter dictate any of Dahl's affairs.[73] Dahl had no

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[70]Tr. V P.151 L.17-P.152 L.2.

[71]Tr. V P.150 L.1-18.

[72]Tr. V P.149 L.8-24; P.151 L.7-13; P.119 L.10-P.120 L.7.

[73]Tr. V P.150 L.19-25.

involvement in any reports required to be filed by Pinter with Oklahoma authorities.[74]

7. Absence of Other Promotional Activities of Dahl. Dahl did not engage in any promotional actitivities as agent for Pinter nor on his own behalf. As former employees of Dahl's subchapter-S corporation, Puma Petroleum Corporation, neither Kirk nor Minor ever attempted to contact people as investors on behalf of Dahl or his corporation; they only acquired leases and Dahl was the only person putting up money to purchase those leases.[75] Gottsch and Dahl did drill the McFarland well in Texas together prior to Dahl meeting Pinter. In that joint venture with Gottsch, Dahl may have been deemed a "promoter". That venture was unrelated to any transaction dealing with Pinter.

8. Judgment and Appeal

In his counterclaims against Dahl, Pinter alleged that Dahl, by means of fraudulent misrepresentations and concealment of the true facts, induced Pinter to sell

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[74] Tr. V P.151 L.14-19.
[75] Tr. VI p.248 l.3-19.

and deliver securities, with the understanding and agreement that "Pinter was only to be the 'operator' who was doing the drilling, testing, completion, leasing, geological research and the like" while "Dahl was to raise the money from a few sophisticated investors."[76] Pinter incorporated his counterclaims in his affirmative defenses of "estoppel" and "in pari delicto" and alleged that by virtue of such fraudulent conduct Dahl should be barred from any recovery. (Pinter also asserted all plaintiffs should be estopped from recovery because of Dahl's fraudulent conduct).[77]

The trial court permitted all plaintiffs to rescind their purchases of securities from Pinter and awarded judgment to Plaintiffs. That court also found that the evidence did not establish that Pinter was entitled to any relief on his counterclaims.[78] Apparently by this finding the court rejected Pinter's affirmative defenses of estoppel and in pari delicto.

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[76] J.A. A-69 through 74, esp. ¶4 and ¶5(e).
[77] J.A. A-66, 67.
[78] Memorandum Decision, Conclusions of Law, ¶14.

The trial court awarded judgment against Pinter and in favor of all plaintiffs based upon their claims under §12(1) and under Art. 581-33A, Texas Securities Act; did not rule on plaintiffs' §12(2) claims because recovery was awarded under §12(1); and denied any recovery under §10(b) and Rule 10b-5, Securities Exchange Act of 1934. Pinter appealed to the court of appeals alleging (1) he was entitled to contribution from Dahl as to Pinter's liability to the other plaintiffs; (2) the trial court failed to rule upon his defense of "estoppel" and that Dahl should be estopped because he purchased with knowledge that the securities were unregistered; and (3) the trial court failed to rule upon his in pari delicto defense in bar of Dahl's recovery as an equal-fault seller. The Fifth Circuit affirmed, holding Dahl's involvement in the sales transactions were insufficient to permit the in pari delicto and estoppel defenses, and that Dahl was not a §12(1) "seller" because his conduct as to his co-plaintiffs was merely gregarious, did not confer any financial benefit upon Dahl and was motivated solely to confer a benefit

upon his co-plaintiffs. The dissent would hold Dahl in pari delicto with Pinter as an equal-fault seller and would permit contribution. A rehearing en banc was denied; the dissent there asserted the majority failed to properly apply Berner in denying in pari delicto and also changed the Fifth Circuit's precedent as to the applicable standards for determining a "seller" under §12. This Court granted Pinter's petition for writ of certiorari on April 20, 1987.

SUMMARY OF ARGUMENT

1. Pinter did not raise the issue of a right to contribution in the trial court. This issue was first raised on appeal. Pinter also did not raise in the trial court the issue that Dahl's knowledge the securities he purchased were unregistered should bar his §12(1) action under the equitable doctrines of estoppel and in pari delicto. Pinter also did not raise the issue in the trial court that Dahl was an equal-fault seller in violation of §5 and thereby should be barred from suing under §12(1) to recover the consideration he paid to Pinter for unregistered securities.

2. The use of the "substantial factor" formula, without more, is an unreliable and speculative method for determining whether or not a collateral participant in a transaction is a "seller" under §12(1). The "substantial factor" formula is capricious and is subject to the whim of its user. Its abuse is apparent where such formula is not limited to simply determining a person's causation in fact in a situation where several forces combine to cause a result. That formula's application results in creating an implied or constructive seller under §12(1), contrary to the statutory scheme. To the extent that the "substantial factor" formula for determining causation in fact is utilized, it must be further determined whether that person is a "seller" within the meaning of the liability provisions of §12. The law should require proof that the person to be deemed a "seller" was responsible, in a substantial manner, for the failure to register the securities or for the attempt to utilize the exemption from registration without seeking to meet the judicial and/or regulatory conditions precedent to the

availability of that exemption. To make Dahl a statutory seller under §12(1) requires that (a) Dahl cause the security to be sold either on his own behalf as principal or as an agent on behalf of and under an agreement with a principal, and for which the agent is to be compensated, or (b) that Dahl had an ownership or promotional interest in the business enterprise of Pinter, or (c) had a promotional interest, as owner in the venture for which the securities were issued, which interest was substantially more than that of a mere investor-owner in the venture, and (d) had an active part in, or is chargeable with the duty for, making a decision that the securities be unregistered and sold in a manner to evade the registration provisions. Dahl's activities met none of these alternatives, and, therefore, he is not a "seller" of the involved securities.

3. Absent Dahl being the selling agent for Pinter or being a co-owner and promoter of the business enterprise utilized to sell unregistered securities, Dahl should not be deemed a "seller" of unregistered securities to the other plaintiffs. Dahl's interest in

the success of the drilling venture as an investor is not the same as a promotional interest or pecuniary interest in the offering of securities or in the overall business promotion and affairs of Pinter.

Determination of liability of a seller to his purchaser is limited to the privity concept of a contractual arrangement between the immediate seller and his immediate purchaser or to an agency-principal relationship between the immediate seller-owner of the property and the immediate seller-agent compensated by the owner. Causation of a sale to occur because an actor is enthusiastic about his own investment, and because he takes part in some phase of the sales process, should not result in the enthusiastic purchaser being a "seller" within the meaning of §12(1). Causation in fact is not liability. The plain language of the statute, particularly when viewed in its relationship to the overall scheme of the securities law, establishes the intent of Congress that liability be based upon privity under §12(1), with privity supplied where there is a principal-agent transaction making

such persons co-sellers. The use of the "substantial factor" formula and the tort-negligence doctrine of "proximate cause" are not applicable to a determination of a "seller" under §12(1). The language of the statute and the relationship of the various regulatory and remedial provisions of the Securities Act in the overall statutory scheme for regulation of the securities industry require that the purchaser recover from his immediate purchaser - the one who parted with the title or as the selling "issuer, underwriter or dealer."

4. As the "issuer/owner-seller" of fractional undivided interests in oil and gas rights in the Clark-Watkins-Clark leases and wells, Pinter is strictly liable to Dahl pursuant to §12(1) because of Pinter's violation of §5 by offering, selling and delivering unregistered, non-exempt securities in interstate commerce and through the mails. Failure of Pinter to either register such securities or to establish an exemption from such registration establishes Pinter's strict liability. Constructive knowledge that he is purchasing unregistered securities does not bar Dahl's right of

recovery by either equitable doctrine - estoppel or in pari delicto - particularly where that notice of non-registration is coupled with an expression that an exemption from registration is applicable. A purchaser's knowledge, actual or constructive, that he is acquiring unregistered securities, without more, does not give rise to a bar of his action for rescission under theories of estoppel or in pari delicto. The benefit of §12(1) cannot be waived by a purchaser of unregistered securities.

As to these same securities (Clark-Watkins-Clark wells) Pinter cannot escape strict liability under §12(1) on the grounds that Dahl's post-purchase conduct in connection with separate offerings (the Doss 3-B and the Antwine 2-C), in a series of unregistered offerings by Pinter, was a substantial contribution to Pinter's sales efforts in those later offerings. Pinter's liability to make restitution under §12(1) was actionable immediately upon Pinter's completion of his sale of unregistered securities to Dahl. The securities laws do not provide that a purchaser lose his right to rescind

should he later become involved, to some degree, in other securities offerings of his seller. Further, the assertion of in pari delicto conduct as to a later investment transaction, or as to a later sales transaction, should not bar rescission as to a prior purchase where the purchaser's conduct was not in pari delicto as to the first sale-purchase transaction. The violative conduct permitting the in pari delicto defense must be related to the same sale-purchase transaction; for example, where there is a knowing violation of §5 by the purchaser who acquires with a view toward, and thereafter engages in, a distribution of those unregistered securities. As to securities he purchased, Dahl remained a purchaser and he is entitled to the benefits of rescission under §12(1).

5. Assuming Dahl is an implied or constructive "seller" of securities to his co-plaintiffs, Dahl was not the person responsible for the decision to not register the securities nor for the decision to not meet the conditions of the "non-public" offering exemption as established by judicial precedent and by Rule 146.

These decisions, and the culpability related to such decisions, are Pinter's. Dahl's activities of bringing in friends, family and associates as prospects by informing them of the investment opportunity does not constitute fault equal to that of Pinter. In no manner is Dahl an "equal-fault seller".

ARGUMENT

I. PINTER DID NOT RAISE THE ISSUE OF RIGHT OF CONTRIBUTION, NOR THE ISSUES OF "ESTOPPEL" AND "IN PARI DELICTO" IN BAR TO DAHL'S SECTION 12(1) ACTION UPON THE GROUNDS THAT DAHL KNEW THE SECURITIES WERE UNREGISTERED AND THAT HE ALSO SOLD SUCH SECURITIES IN VIOLATION OF SECTION 5. THOSE ISSUES WERE FIRST RAISED ON APPEAL AND SHOULD NOT BE REVIEWED.

In his trial pleadings, Pinter did not raise the issue of right of contribution from Dahl toward Pinter's liability to the other plaintiffs. Such issue was not before the trial court. As to the defenses of estoppel and in pari delicto, Pinter did not raise such defenses in the context of Dahl being a "seller" in violation of §12(1); such issues were raised in the context of common law fraud by Dahl upon Pinter.

The issues of "estoppel" and "in pari delicto" were raised by Pinter as his Second and Fifth affirmative defenses in his Answer to Plaintiffs' Complaint. Those affirmative defenses asserted that Dahl's wrongful conduct was the making of fraudulent misrepresentations, and by concealment and nondisclosure of facts, all as set forth in Pinter's Counterclaims which were incorporated by reference in those two affirmative defenses. Pinter claimed the misrepresentations and omissions induced him to deliver securities to plaintiffs which plaintiffs bought with the understanding and agreement between Pinter and Dahl that "Pinter was only the 'operator' of the properties and that Dahl would raise the money."

The Second Defense concerning "estoppel" sought to bar all plaintiffs from seeking to enforce their cause of action

> "because the securities they received were sold, and their delivery effectuated, by fraudulent misrepresentations, concealment and willful nondisclosure . . . [by] Dahl, all as more particularly set forth in [Pinter's] Counterclaim . . . which is incorporated by reference herein."[79]

The Fifth Defense concerning "in pari delicto" sought to bar Dahl from recovery under his causes of action for the reason that

> "Dahl engaged in fraudulent misrepresentations to Pinter and the other plaintiffs, all as set forth in [Pinter's] Counterclaim. He is therefore barred from recovery . . . by reason of his conduct in pari delicto in connection with the offer, sale and delivery of the securities of that which he complains."[80]

Counterclaim Counts One and Two both allege that Dahl engaged in common law fraud by (1) affirmative false misrepresentations, concealment and willful nondisclosure of facts which induced Pinter to permit Dahl to raise the money from a few sophisticated investors while "Pinter was only an 'operator', i.e. the man who was doing the drilling, testing, completion,

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[79] J.A. A-66.
[80] J.A. A-67.

leasing, geological research and the like . . . ."[81] Pinter alleged he relied upon such false representations to his damage. The trial court found that, "The evidence did not establish that defendants are entitled to any relief on their counterclaims." The affirmative defenses of "estoppel" and "in pari delicto", as grounded upon the alleged freud as contained in such Counterclaims, fell with such finding by the court.[82]

In the Counterclaims and thereby in the Affirmative Defenses, the specific allegations of wrongful conduct to estop Dahl and which was in pari delicto are that Dahl misrepresented material facts to induce Pinter to make sales of securities to Dahl and to induce Pinter to allow Dahl to raise investment capital by selling securities to prospective investors in exchange for Black Gold paying him a sales commission of

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[81] J.A. A-69-74, esp ¶4 and ¶5(e).
[82] Memorandum Decision, Conclusions of Law, ¶14.

$38,000;[83] that the misstatements of material fact used by Dahl to induce Pinter's conduct were Dahl's false statements that (a) Dahl was an experienced oil man who had a number of friends and business associates who were knowledgeable and sophisticated oil and gas investors who also had sufficient expertise to independently evaluate any drilling and leasehold prospects; and (b) that Dahl represented he would independently provide prospective investors with the facts upon which they could make an independent

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[83] Dahl refuted this "commission for sales effort" allegation by producing bank wires, checks and business records to show his payments, that he had loaned money to Pinter and some of his interests were purchased by cancellation of the loan-indebtedness Pinter owed to him. Pinter then admitted he "was in error" as to the commissions and that no consideration flowed from Pinter/Black Gold to Dahl in exchange for sums invested by Dahl's friends. The trial court's findings were specific - no commission was received by Dahl "by way of discount or otherwise, in connection with the purchase by any plaintiff [of the involved securities] . . . ." See Memorandum Decision, ¶21, p. a-34, Respondent's Brief Opposing Petition for Writ of Certiorari.

analysis.[84] These pleadings did not thereby raise the issue of "estoppel" and "in pari delicto" as to conduct of Dahl as a "seller" in violation of §12(1).[85] The affirmative defenses raised in the trial court did not assert that Dahl's recovery should be barred because of his knowing purchase of unregistered securities nor because of Dahl's participation in a sale of unregistered securities to other purchasers. Those defenses did not assert Dahl violated §5 nor that he was liable under §12(1), Securities Act of 1933. As raised in the trial court those defenses affirmatively asserted as a bar to recovery that Dahl had wrongfully misrepresented material facts to Pinter which induced Pinter to sell securities to Dahl and which induced Pinter to allow Dahl to sell securities to the other Plaintiffs in exchange for a $38,000 commission to Dahl. Pinter alleged he did not know the truth as to the facts so

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[84] Pinter acknowledged giving Dahl a Report containing a geological evaluation and future possible production to show the remaining plaintiffs, but Pinter stated such Report was "only to show where the wells were [to be] located." See text and related footnotes, supra, at pp. 14-16.

[85] J.A. A-40 through A-80.

misrepresented and he, Pinter, relied upon the misrepresentations to his detriment[86].

These pleadings of alleged fraudulent conduct by Dahl were unsupported by the evidence, the trial court concluding that the "evidence did not establish that Defendants are entitled to any relief on their counterclaims"[87] (see ¶14, p. a-38). The trial court also found that "Dahl did not have a 'control relationship', by ownership, agency, or otherwise," with Pinter and/or Black Gold[88] and that "Pinter, individually and doing business as Black Gold Oil

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[86]See Second and Fifth Defenses as related to Counterclaim One, J.A. A-66, 67, 69-73. As such affirmative defenses related to Counterclaim Two, Pinter affirmatively asserts, "Dahl wrongfully concealed and failed to disclose . . . his plan to turn 'turkey' and file a lawsuit . . . [should] the oil properties not pay out in accordance with his unreasonable expectations" and that Dahl made fraudulent "misrepresentations [to the other Plaintiffs] concerning the likelihood of recovery of oil and gas." Pinter asserted those misrepresentations and omissions were Dahl's wrongful acts in bar to Dahl's recovery under the doctrines of estoppel and in pari delicto. Unquestionably, the trial court's finding that the evidence did not support this Counterclaim is conclusive as to its usage as an affirmative defense.

[87]See Memorandum Decision, ¶14, P.a-38, Respondent's Oposition to Pet. for Writ.

[88]Id., ¶6, P.a-36.

Company, offered, sold and delivered securities in the Antwine 2-C and Doss 3-B to the California investors".[89] These three findings, coupled together, are sufficient to support the trial court's implied finding that the affirmative defenses (estoppel and in pari delicto) were unproven as those defenses were raised.

As such defenses are raised they assert Dahl's fraud bars his 10b-5 action against Pinter. Even removing Pinter's allegations of reliance and scienter, the most such defenses could relate to would be a §12(2) cause of action as to untrue statements and omissions to state material facts in oral communications in selling securities. To these allegations Dahl raised his "due care" defenses as permitted by §12(2). Apparently the Court of Appeals did not consider these distinctions between Pinter's defensive pleadings in the trial court and those first raised on appeal. Respondent asserts the distinction is sufficient so that the trial court was possibly unaware such affirmative defenses raised

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[89]Id., ¶12, P.a-32.

alleged fraudulent conduct of Dahl as a bar not only to Dahl's fraud claims under §10(b), Securities Exchange Act, and, possibly §12(2), Securities Act, but also to Dahl's claims under §12(1). Based upon the pleadings, the trial court could not be aware of an ever evolving issue to be determined by application of estoppel and in pari delicto based upon an unclaimed violation by Dahl of §5. Nor could the trial court be aware of a claim of strict liability under §12(1) for Dahl's knowing purchase of unregistered securities and for Dahl's alleged sale of other unregistered securities to his co-plaintiffs. The Court of Appeals for the Fifth Circuit has previously refused to consider the in pari delicto defense where on appeal it was first asserted that Plaintiff engaged in a section 5(a) violation along with Defendant.[90] Such should have been the ruling in the Fifth Circuit, and those issues are not properly presented here for this Court.

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[90] John R. Lewis, Inc. v. Newman 446 F.2d 800 (5th Cir. 1971).

II. A PERSON OTHER THAN THE PERSON WHO PASSED TITLE TO THE SECURITY MAY BE LIABLE UNDER SECTION 12(1) ONLY WHERE THAT PERSON, BY AGREEMENT, ACTS AS AGENT FOR THE SELLER AND IN SUCH CAPACITY SOLICITS THE BUYER TO PURCHASE.

As the "issuer/owner-seller"[91] of the fractional undivided interest in oil and gas rights in the Doss 3-B and in the Antwine 2-C wells, Pinter seeks to avoid his strict liability for such interests which he sold to Dahl and, in addition, to obtain contribution from Dahl in discharging Pinter's liability to the other plaintiffs. To do so Pinter asserts Dahl is a co-seller of such securities to the other plaintiffs. By establishing Dahl as a co-seller, Pinter then would seek to utilize such status to have Dahl declared an "equal-fault seller" so as to bar Dahl from rescinding and recovering the

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[91] §2(4) defines "issuer" to mean the owner of any right or interest in oil, gas or other minerals "who creates fractional interests therein for the purpose of public offering." The facts of this case clearly establish Pinter as the owner who created fractional interests for a public offering and that he sold his ownership interests to plaintiffs and to others. The use of the combined term "issuer/owner-seller" is to reflect Pinter's complete involvement in the new issue and in its distribution and sales process.

purchase price he paid to Pinter for such securities. Pinter's theories seek to shift from himself to Dahl part of his strict liability to the other plaintiffs and to also eliminate, in whole or in part, Pinter's strict liability to Dahl. To do so Pinter asserts the determination of seller status should be in terms of the tort-negligence concept of "proximate cause" with causation in fact as to the sale to be established where Dahl, as a collateral participant, was a "substantial factor". It is Dahl's position that application of the "substantial factor" formula to detemine a collateral participant's status as a "seller", and therefore liable under §12(1) for §5 violations, is contrary to Congressional intent as demonstrated by the express language of the involved section and as it relates to the overall Congressional scheme for regulation of the securities industry.

A. The persons to be deemed liable as a "seller' under §12(1) must be a "selling issuer, underwriter or dealer" responsible for compliance with the requirement to provide all material information in an effective registration statement or in the sales material.

The legislative history of §12(1) provides little assistance because references therein concerning civil liabilities are sparse - almost totally absent as to §12(1). A comparison of the statutory scheme of coverage of §11 and §12 as to civil liabilities, together with the express language used in those sections, indicates that the "expanded seller" concept as developed by the Fifth Circuit and other courts is not what the legislature intended - and we should not enlarge upon the statute in the belief that the remedial nature of these securities laws so requires.[92]

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[92]In Ernst & Ernst v Hochfelder, 425 U.S. 185, this Court recognized its prior rulings that we are dealing with "remedial legislation" to be flexibly construed, not technically and restrictively, to effectuate the statute's remedial purpose, citing Tcherepnin v Knight, 389 U.S.332,336 (1967), Affiliated Ute Citizens v U.S., 406 U.S.128,151 (1972) and others. However, the Court in Hochfelder pointed out at 193 and 195

"It is thus evident that Congress fashioned standards of fault in the express civil remedies in the 1933 and 1934 Acts on a particularized basis.

The Securities Act of 1933 contains two provisions that impose strict civil liability without reference to fault so as to enable a buyer of securities to recover his purchase price by rescinding the sales-purchase transaction with a minimal amount of proof as to the conduct making a person liable. §11 permits a purchaser to recover his payment for a security by showing the related effective registration statement contained false or misleading omissions as to statements of material fact. In contrast §12(2) provides recovery whether or not a registration statement is in effect, where the false or misleading omission to state a material fact is made by means of

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(cont.)

Ascertainment of Congressional intent with respect to the standard of liability created by a particular section of the Acts must therefore rest primarily on the language of that section. Where, as here, we deal with a judicially implied liability, the statutory language certainly is no less important. * * *"

* * *

"* * * As the Court indicated in SEC v National Securities Inc., 393 U.S. 453, (1969) 'the interdependence of the various sections of the securities laws is certainly a relevant factor in any interpretation of the language Congress has chosen . . . .'"

a prospectus or oral communication. Unlike §11 and §12(2), §12(1) applies only where there is a violation of §5, i.e. only where there is no effective registration statement, provided the jurisdictional element of mails or interstate commerce is met.

In general, lack of knowledge or negligence are available as affirmative defenses in §11 and in §12(2). However, strict liability is applicable to an "issuer" under §11 and strict liability is applicable to a "seller" under §12(1). Thus where there is an effective registration statement containing false information the issuer is strictly liable to a purchaser unless the issuer proves that the purchaser knew of the untruth or omission at the time of purchase. Compare §12(1) where the seller is strictly liable unless he can establish that §5 was not violated - i.e. either (a) the transaction was exempt from the requirement to have an effective registration statement[93] or (b) the jurisdictional means were not used.

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[93]Section 4 provides that "the provisions of Section 5 shall not apply" to certain type transactions.

Such statutory construction permits the dovetailing of the strict liability and the knowledge/negligence liability provisions of §§11, 12(1) and 12(2). As to a registered security (i.e. one which is part of an effective registration statement) an issuer is strictly liable where the registration statement contains false or misleading statements or omissions of material fact. As to an unregistered security (i.e. those not covered by an effective registration statement) the selling issuer, underwriter or dealer is strictly liable for violation of §5. Under §4 there are exemptions from the provisions of §5. By establishing such an exemptive transaction strict liability of a seller under §12(1) is eliminated if all its conditions are met so there is no violation. The issuer may escape liability under §11 only by establishing the purchaser knew of the untruth or omission.

Where a false or misleading statement or omission of material fact is contained in the registration statement (§11) or in the prospectus or oral communication (§12(2) and where there is a failure to

prove lack of knowledge and lack of negligence, the "underwriter" is liable under both sections, the "issuer" is liable under §12(2) (but strictly liable under §11), and the dealer is liable under §12(2) - provided as to §12(2) those persons are the sellers. Thus where there is compliance with the requirement to file a registration statement strict liability is imposed upon the issuer and knowledge/negligence liability is imposed upon those others involved in the registration/distribution process. In contract §12(1) provides where there is not compliance with the registration process there is strict liability for all persons involved in the distribution process as a "seller". Where the sales communication or presentation (written prospectus or oral communication) involves false or misleading statements or omissions of material facts, whether the securities were or were not part of an effective registration statement, under §12(2) liability is imposed upon those involved in the sales process - a "selling issuer,

underwriter or dealer" - should they fail to prove they lacked knowledge or negligence.

In sum, the civil liability provisions of §11 and §12 impose strict liability upon persons who have the duty to ensure that the securities are registered (i.e. issuers, underwriters or dealers under §12(1)); strict liability upon the person who is primarily responsible to ensure that the registration statement is factually correct (i.e. the issuer under §11); and imposes knowledge/negligence liability upon those involved in the preparation of registration documents (i.e. underwriter, some personnel of the issuer, experts under §11) and upon those involved in the use of sales documents and oral communications (i.e. selling issuers, underwriters or dealers under §12(2)) where such material is not factually correct in all material respects unless they establish their lack of knowledge or negligence.

To determine who is liable under §12(1), it is necessary to weave in and out of the various sections relating to non-registration, registration, violations and

liability for violations. Unlike §11 where the persons liable are specifically identified, §12(1) does not specifically identify those strictly liable. Under §12(1) the person identified as strictly liable is the person who "offers or sells in violation of §5." §4 provides that §5 shall apply only to transactions by an "issuer, underwriter or dealer." For one to engage in a sales transaction in violation of §5, thereby becoming liable under §12, that person must be an "issuer, underwriter or dealer" since all other transactions by all other persons are exempt under §4(1). The person to whom he may be liable is "the purchaser from him."[94] This construction of §12(1) requires that the purchaser of an unregistered security may recover the consideration paid by him to the "issuer, underwriter or dealer' who sold such unregistered securities to him.

Congress thus provided under §11 that <u>any purchaser of securities through an effective registration</u>

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[94]Compare §11 which provides that the "issuer" is strictly liable to "<u>any purchaser</u>" who purchases a security which is the subject of an effective registration statement.

statement shall recover from the issuer where that statement was materially false or misleading. In contrast, Congress provided for mandatory recovery under §12(1) by a purchaser only against the person (i.e. "issuer, underwriter or dealer") from whom he purchased securities not covered by an effective registration statement.[95] The seller under §12(1) must be the "issuer, underwriter or dealer", the same persons who would be principally involved in the registration-sales process under §5 and §11 and who have the duty to ensure there is an effective registration statement. The Congressional parameters of "who" is liable to "whom" were so established - "whom" being the purchaser from "who", i.e. from the selling[96] "issuer, underwriter or dealer". The purchaser may only

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[95] Note the same persons may be liable as "sellers" under §12(2) if they fail to bear their burden of proving a lack of knowledge or negligence.

[96] §12 does not use the term "seller'; it uses the phrase "any person who offers of sells". The Act does define "offer", "sell", "sale" and similar terms. See §2(3). The term "seller" is read into that section as descriptive of the person and his conduct. The term "seller" is not defined anywhere in the statute.

recover from his immediate seller provided that seller is an "issuer, underwriter or dealer".[97]

Any judicial attempt to identify the "seller" for purposes of §12 must first consider whether a person is an "issuer, underwriter or dealer". §2(4) defines an "issuer" of oil and gas securities to be the owner of any right or interest in oil or gas interests "who creates fractional interests therein for the purpose of public offering."

Under the facts of this case it is an established fact that Dahl did not create fractional interests in oil and gas rights, nor was he the owner of any such rights other than those sold to him by Pinter after fractionating them, nor did Dahl sell any of those rights which he purchased from Pinter. Further, the concept and definition of "issue" is the placing in circulation of property, either as the initial distribution or as a continuation of the process of the initial

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[97] Because §12 refers to the purchaser's right of action against the person from whom he has purchased, all future references are to a completed sales transaction; to "sale and "seller" and not to "offer" or "offerer".

distribution. Dahl did not place the securities in circulation either initially or as a continuation of the distribution. Dahl is therefore not an "issuer".

§2(12) defines "dealer' as a person who engages directly or indirectly as an agent, broker, or principal in the business of offering, buying, selling or otherwise dealing or trading in securities issued by another; this engagement may be part-time and need not be a full-time profession. Dahl does not fit within the definition of a "dealer".

§2(11) defines "underwriter" to be any person who purchased from an issuer with a view to the distribution of that security or any person who offers or sells for an issuer in connection with the distribution of a security or [who] participates or has a direct or indirect participation in any such undertaking [i.e. the distribution] or in the underwriting. Dahl is not within the first definition of an "underwriter". Difficulty arises when the second and third parts of the definition of "underwriter" are involved - the inquiry proceeds to the distribution of Pinter's securities and whether

or not Dahl sold on behalf of Pinter in connection with that distribution or had a participation in that distribution. To sell "for Pinter" requires a contractual relationship between Dahl and Pinter with reference to Pinter's distribution. The evidence showed there was no such contractual relationship - no agreement, express or implied - as to such distribution. Left for discussion is whether Dahl may be an underwriter based upon any participation in the illegal distribution - i.e. did Dahl participate with the "issuer" in the illegal distribution? SEC v Chinese Consol. Ben. Assn[98] and SEC v Murphy[99] emphasize that participation with an issuer in a transaction involving a distribution is what brings §5 into play and, accordingly, one may be a participant in the illegal distribution (involving a new issue and not a secondary distribution) and in violation of §5.[100] It is at this point where the SEC looks to

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[98] 120 F.2d 738 (2d Cir. 1941)
[99] 626 F.2d 633 (9th Cir. 1980).
[100] Dahl is not here urging he was involved in an exempt transaction under §4(1). His position is that a seller liable under §12(1) must be an issuer, underwriter or dealer. Participation in the distribution may constitute one as underwriter.

the promotional role of one in the position of Dahl. This matter as to "participation in promotional efforts" is dealt with below in part III of this brief.

The language of §12(1) is sufficiently clear to show that a purchaser's action is limited to his immediate seller. Cady v Murphy[101] acknowledged that there is no reference in the legislative history of §12 which discusses this issue of privity, the immediate buyer-seller relationship. In fact that legislative history provides no support for expanding the concept of "seller" under §12 beyond the purchaser's immediate seller. Congress probably did not foresee the taking in of collateral participants as "sellers" under §12(1) beyond those within the definition "issuer, underwriter or dealer".

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[101] 30 F.Supp. 466,469 (D.Me. 1939) aff'd 113 F.2d 988 (1st Cir. 1940), cert.den. 311 U.S. 705 (1940).

B. Use of the "substantial factor" formula in conjunction with the tort-negligence doctrine of "proximate cause" is complex, unreliable, and results in placing liability upon collateral participants not contemplated by Congress to be liable under §12(1).

Although Cady v Murphy first extended the concept of "seller" under §12, at least the First Circuit narrowed the application to a broker being a seller where he functions as agent and he solicited an order. The further extension of the term "seller" in §12 cases has gone beyond the plain meaning of the term "seller" and beyond the scope of those persons identified by Congress as being within the ambit of the §5 registration-sales process and, therefore, within the ambit of a violater under §12(1). Congress looked at the "sale" as being the injury but the proscribed conduct was the failure to provide meaningful and material information to enable the investor to make an informed investment decision. The matter to be corrected was the need for disclosure and the duties and liabilities for performance of those duties are upon those

connected with the registration-selling process as issuers, underwriters or dealers.[102]

Lennerth v Mendenhall[103] started or gave impetus to establishing a standard whereby a person involved in a promotional manner in the securities selling process could yet be responsible in damages to the purchaser, even though he was not the immediate seller or an owner parting with title. The Fifth Circuit

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[102]President Roosevelt's transmittal message recommending Congressional enactment of federal securities regulation states:

> "There is, however, an obligation to insist that every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public."
>
> "This proposal . . . puts the burden of telling the whole truth on the seller."
>
> * * *
>
> "What we seek is a clearer understanding of the ancient truth that those . . . handling or using other people's money are trustees acting for others."

H.R. Document No. 12, 73rd Cong., 1st Sess., March 29, 1933.

These references to "seller" and to persons "handling or using other people's money" having an obligation to ensure "full publicity and information" support this view as to who has the responsibility and the liability for failure to provide information through an effective registration statement.

[103]234 F.Supp.59 (ND Ohio 1964).

adopted and clarified the concept and reasoning set forth in Lennerth in its decision in Hill York Corporation v American International Franchises[104] and which decision has repeatedly been cited, applied and clarified.[105] Citing Lennerth, Hill York stated:

> "The law is settled that a purchaser may only recover from his immediate seller. * * * The law is not settled, however, as to who may be a seller. It is clear that a seller is not required to be the person who passes title. * * * Although the term 'seller' has sometimes been accorded a broader construction under Section 12(2) than under Section 12(1), we adopt a test which we believe states a rational and workable standard for imposition of liability under either section. Its base lies between the antiquated 'strict privity' concept and the overbroad 'participation' concept which would hold all those liable who participated in the events leading up to the transaction. * * * We hold that the proper test is * * * [did the purchaser's] injury flow directly ad proximately from the actions of this particular defendant?"

In applying that test to the facts, Hill York sought to determine what persons fell within the letter and spirit of the proximate cause test as the "motivating force" behind the promotion and who "did everything but

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[104]448 F.2d 680 (5th Cir. 1971).

[105]Croy v Campbell 624 F.2d 709 (5th Cir. 1980); Pharo v Smith, 621 F.2d 656 (5th Cir. 1980); Swenson v Engelstad, 626 F.2d 421 (5th Cir. 1980); Junker v Crory, 650 F.2d 1349 (5th Cir. 1981).

effectuate the actual sale". Lewis v Walston[106] recast the Hill York "proximate cause" test into a test to determine whether or not the defendant's actions were a substantial factor in bringing about the plaintiffs' purchases.

Pharo specifically noted that the "definition of seller has been broadened slowly and cautiously . . . because of the strict liability prescribed" and that Lewis and Hill York limited §§12(1) and 12(2) "sellers" to (i) those in privity with the purchaser and (ii) "those whose participation in the buy-sell transaction is a substantial factor in causing the sale to take place." Pharo noted

> "* * * Section 12(2) unlike Section 12(1) would relieve a seller who sustains 'the burden of proof that he did not know and in the exercise of reasonable care could not have known of the violation of the statute's antifraud provision. Section 12(1) however would impose liability on a person regardless of his knowledge that unregistered securities may have been sold. **The precise question the Hill York panel declined to consider is whether the definition of a section 12(1) seller should be tempered by the policy against broadening the scope of a strict liability statute to include persons not clearly within its intended reach.**" (Emphasis supplied).[107]

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[106] 487 F.2d 617, 621-22 (5th Cir. 1973).

Pharo recognized that mere participation in a sales transaction does not make one a §12 "seller". At 667 the Pharo court stated:

> "Mere participation in the events leading up to the transaction is not enough. But beyond the words 'substantial factor', we have no guideposts other than the factual situations presented in . . . [Hill York and Lewis v. Walston & Co.] to assist us in determining whether to impose strict liability in a given case."

Tracing the evolution of tests to determine a §12 "seller", Croy v. Campbell stated:

> "Participation in the sale . . . is an important factor only as it relates to the concept of causation. A determination [of participation] . . . should not be conclusive as to the participant's liability as a seller but it may be a criterion in determining [if] . . . defendant caused the transaction to take place."[108]

Davis v Avco Financial Services, Inc.[109] sifts through the §12 liability problem as to conduct and acts between a securities purchaser and a person who is not a literal "seller" but is collaterally involved in the transaction sufficiently to extend §12 liability to that

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[107] 621 F.2d 656,659 fn.6.
[108] 624 F.2d 709 (5th Cir. 1980).
[109] 739 F.2d 1057 (6th Cir. 1984) cert.den. 105 S.Ct. 1359 (1985).

person. Davis v Avco Financial refused to analyze or to express an opinion as to an expanded meaning of "seller" and the imposition of secondary liability upon persons involved in a §12(1) action; however, Davis did adopt the identification of a "seller" under §12(2) as expanded by the negligence theory of proximate cause. In reviewing Fifth Circuit precedent, Davis notes the proximate cause touchstone was broadened to include "substantial factor" in order "to harmonize the securities law model with a similar development in tort law."

Concerning the meaning of "substantial factor", Davis quotes Restatement (Second) of Torts §§432, 433. §432 reflects that negligent conduct must be an antecedent of the harm. §433 identifies important factors to consider in determining whether negligent conduct is a substantial factor in producing harm. Those sections, and §431, are the foundation for the culpability standard to be applied under §12 as applied in the Fifth Circuit, the Sixth Circuit (Davis, supra)

and in the Ninth Circuit.[110] Davis adopted the position of Murphy and of Hill York and Lewis. In describing the "proximate cause-substantial factor" standard, Murphy, at 650 observed:

> "In assessing proximate cause, courts focus first on whether defendant's acts were the actual cause of the injury, i.e., whether 'but for' the defendant's conduct, there would have been no sale. • • • A finding of 'but for' causation, alone, does not satisfy proximate cause, however. • • • Before a person's acts can be considered the proximate cause of a sale, his acts must also be a substantial factor in bringing about the transaction. • • • Thus, a defendant will be held liable as a participant under §12 if his acts were both necessary to and a substantial factor in the sales transaction. • • • " [citations omitted]

Davis was a §12(2) case which required an affirmative defense of showing an exercise of ordinary care. Factors considered by the Davis court to determine whether that defense was established were

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[110] SEC v Murphy, 626 F.2d 633,650 (9th Cir. 1980).

> "(1) the quantum of decisional (planning) and facilitative (promotional) participation, such as designing the deal and contacting and attempting to persuade potential purchasers, (2) access to source data against which the truth or falsity of representations can be tested, (3) relative skill in ferreting out the truth . . . [e.g.] in evaluating judgments based upon subsidiary facts, since he performed a similar function in the process of investigating . . . (4) pecuniary interest in the completion of the transaction, and (5) the existence of a relationship of trust and confidence between the plaintiff and the alleged 'seller'. * * * "

Each of the above factors identified in Davis to be considered in determining ordinary care have also been utilized, and should be, in determining whether or not a participant in the "selling process" is a "seller" within the meaning of §12(1). A determination and weighing of such factors will generally establish whether or not a defendant's acts were a substantial factor in the sales transaction which, when coupled with his acts which are found to be necessary to that sale ("but for"), would result in the proof of "proximate cause" of harm to the purchaser-plaintiff.

The Fifth Circuit and other courts have historically borrowed from Tort law in attempting to apply §12(1) and §12(2) to various fact situations. In most instances

where acts of participation are alleged to be a 'substantial factor' those acts have involved (a) conduct where one accomplished a wrongful result with his own conduct constituting a breach of duty to the injured party, or (b) at a minimum, that participant knew another person's conduct involved a breach of duty and, despite such knowledge, the participant gave substantial assistance or encouragement to the wrongful conduct of the person who breaches his duty,[111]

As Chief Judge Lively states in his dissent in Davis v. Avco Financial Services, Inc.,

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[111]See Pharo v. Smith, Hill York, Lewis v. Walston & Co., Junker v. Crory. See also "Restatement (Second) of Torts §876 ("Acting in concert"), §§431, 432, 433 ("negligent conduct" and "considerations in determing if negligent conduct is a substantial factor in producing harm"). Note the trial court found Dahl was not a controlling person and did not find Dahl to be a aider or a principal.

"• • • The federal securities laws . . . do display a studied approach to a variety of problems. Different participants in various stages and types of securities transactions are treated individually. • • •"

• • •

"Acertainment of congressional intent with respect to the standard of liability created by a particular section of the securities acts must 'rest primarily on the language of that section,'" citing Ernst and Ernst v. Hochfelder, 425 U.S. 185, 200, 96 S.Ct. 1375, 1384, 47 L.E.D.2d 668 (1976).

In the face of this congressional scheme, the Fifth Circuit goes beyond the limited scope of persons potentially liable, using the broad theory of "participation" to go beyond the constraints of the statutory definition of an "underwriter".[112] The Fifth Circuit has looked to causation in fact under the formula of "substantial factor" where several causes contribute to a result to determine if a person is included as a person who should be deemed liable. The proximate cause analysis, with its substantial factor formula, has become a rule of inclusion as to legal liability as opposed to exclusion as to cause. In

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[112] "Participation" within the meaning of an "underwriter" has limited application by the specific language of the definition.

discussing causation in fact, William L. Prosser states:[113]

"It cannot be repeated too often that, while causation is essential to liability, it does not determine it. Other consideration . . . may prevent liability for results clearly caused."

"Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for what he has caused. Unlike the fact of causation, with which it is often hopelessly confused, this is essentially a problem of law . . . .[T]his becomes essentially a question of whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred . . . . This is not a question of causation, or even a question of fact, but quite far removed from both; and the attempt to deal with it in such terms has lead and can lead only to utter confusion.

"As applied to the fact of causation alone, the [substantial factor] test is of considerable assistance, and perhaps no better guide can be found. But when the "substantial factor" test is made to include all the ill-defined considerations of policy which go to limit liability once causation in fact is found, it has no more definite meaning than "proximate cause," and it becomes a hindrance rather than a help. It is particularly unfortunate insofar as it suggests that the questions involved are only questions of causation, obscuring all other issues . . . . [T]he 1948 revision of the Restatement has limited it

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[113] W. Prosser, Handbook of the Law of Torts, (4th ed. 1971).

application very definitely to the fact of causation alone."[114]

In an excellent critical evaluation of judicial decisions which enlarge the scope of the term "seller" under §12(2) Professor O'Hara states:

> "Without any pretext of premise in the statutory definitions of 'offer' and 'sell' in section 2(3), the Fifth Circuit chooses to define seller in broad policy strokes by borrowing one of the most complicated concepts of tort law with all of its attendant problems. The substantial factor formula is considered in torts a sufficiently intelligible phrase to serve by itself as an adequate guideline for determining the question of causation in fact. However, once it has been established that the defendant's conduct was in fact one of the causes of the plaintiff's injury, tort law has long recognized the inadequacy of the substantial factor test for determining whether the defendant's conduct was so significant and important a cause that the law should extend responsibility for the conduct to the consequences which have occurred. It is this latter question which is at issue in most of the proximate cause cases . . . [and] For purposes of this inquiry, the substantial factor test lacks any definite meaning."[115]

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[114] Id. §42.

[115] "Erosion of the Privity Requirement in Section 12(2) of the Securities Act of 1933: The Expanded Meaning of Seller," Patricia A. O"Hara, Assoc. Prof. of Law, University of Notre Dame Law School, 31 U.C.L.A. Law Review 921, 993, fn. 387 (June 1984). Although this article is essentially concerned with collateral participants and their questionable "seller"

III. A PERSON OTHER THAN THE PERSON WHO PASSES TITLE TO THE SECURITY MAY BE LIABLE WHERE THAT PERSON IS ESTABLISHED AS A CO-SELLER WITH THE PERSON TRANSFERRING TITLE BECAUSE OF (1) A MATERIAL PARTICIPATION IN THE SALES PROCESS (2) WHERE HE HAS A PECUNIARY INTEREST IN THE ENTERPRISE BEING PROMOTED (3) WHICH INTEREST EXCEEDS THAT OF A MERE INVESTOR IN THAT PART OF THE ENTERPRISE BEING PROMOTED.

Where a person engages in promotional efforts in connection with an unregistered offering of non-exempt securities that person may be subject to personal liability where his efforts are material to the overall success of the sale and distribution of the securities issue involved, and he has a direct or indriect pecuniary interest in the enterprise being promoted which exceeds that of a mere investor in the promoted enterprise.

(cont.)
liability for false and misleading statements of material fact under §12(2) that analysis is also applicable to §12(1). The primary thesis of Prof. O'Hara is that persons who are collateral participants should not be brought in as "sellers" through strained interpretations, which are essentially policy decisions, where Congress intended limited scope as evidenced by reduced burdens of proof, privity, the plain language of the statute, etc. Her contention is that Congress provided other and clearer avenues for imposing liability upon collateral participants - particularly the use of §10(b) under the 34 Act, not §12(2).

Active material promotion coupled with the motivation to obtain a pecuniary benefit must be of such substance as to constitute that actor an "underwriter" permissibly liable under §12(1) or liable as a person in a control relationship with an "issuer, underwriter or dealer" who would be liable under §15. This comports with the careful and systematic layout of the provisions of civil liability for proscribed conduct as established by Congress. It also meets the intent of statutory language contained in the second and third clauses of the §2(11) definition of an "underwriter": i.e. (a) "or participates or has a direct or indirect participation in any such undertaking" [distribution of securities] (b) "or participates or has a participation in the direct or indirect underwriting of any such undertaking." Activities of a promoter of an enterprise who materially engages in the sales and distribution process for a pecuniary advantage may then be within either the controlling persons provision of §15 or the seller provision of §12(1). The definition of a "promoter" under the securities laws is based upon the type of

conduct deemed promotional and the benefits to be received. Thus "promoter" under Rule 405 includes:

> "(a) Any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes the initiative in founding and organizing the business or enterprise of the issuer;
> (b) Any person who, in connection with the founding or organizing of the business or enterprise of an issuer, directly or indirectly receives in consideration of services or property, or both . . . 10% or more of any class of securities of the issuer . . . or of the proceeds from the sale of any class of securities. However, a person who receives such . . . [consideration] solely as an underwriting commission or solely in consideration of property shall not be deemed a promoter . . . if such erson does not otherwise take part in founding and organizing the enterprise."[116]

To be found a promoter within Rule 405(q)(1), one must either be active in the issuers business or actively engaged in the formation of the issuer. To be an active paritipant in the formation, one must be involved in the transaction by which the issuer acquires the properties essential to the conduct of its business or

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[116] 17 C.F.R. §230.405(q)(1), Definition of Terms, Regulation C., for registration of securities. The same definition is contained in 17 C.F.R. §240.12B-2 for registration pursuant to §12(b), Securities Exchange Act of 1934 and in Regulation A.

in the mechanics of the underwriting and registration process.[117]

A "promoter" of an actual or proposed enterprise is also defined[118] as "a person who, acting alone or in concert with other persons, is initiating or directing, or has within one year initiated or directed, the organization of such . . . [enterprise]." The emphasis in all definitions is upon the acts of "initiating" or "organizing" an enterprise which is the subject of the offering or which is conducting an offering and distribution. Such persons, "promoter", are required to be identified, and their arrangements with the issuer disclosed, in a registration statement.[119]

Dahl has none of the indicie of a promoter. The only instance in which Dahl had an interest in an

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[117] In the Matter of Shawnee Chiles Syndicate (194) 10 SEC 109,141-44 CCH Dec. ¶75, 199; Oklahoma-Texas Trust v S.E.C. 100 F.2d 888 (10th Cir. 1939); In the Matter of Platoro Gold Mines, Inc. (1938) 3 S.E.C. 872.

[118] Investment Company Act of 1940, Definitions, §2(a)(30).

[119] Schedule A, Registration of Securities, Item 4, Executive Personnel and Promoters. 2 CCH Fed.Sec.Law Reporter ¶5513.07.

enterprise is where Dahl loaned Pinter $38,000 for the purpose of Pinter acquiring the Clark-Watkins-Clark leases. In exchange for that loan Dahl received an option or right of first refusal to participate in any wells drilled upon those three leases. Dahl received no ownership or right as to ownership interest in such leases by such loan. Later, Dahl, with Gottsch, exercised such right and acquired a 3/8ths working interest in one well drilled upon each of those leases - a total of three wells for which 3/8ths ownership Dahl paid a total of $251,000 - such interest was confined to the wells and did not encompass the entire leases. In fact, Pinter later offered Gottsch and Dahl to finance the drilling of three more wells upon those leases - which offer they declined. The point is that the property that was the subject of Dahl's loan to Pinter is property that always remained the property of Pinter and with no profit to Dahl; the only benefit to Dahl being the option to acquire an interest in future wells which might be drilled upon those leases. A general loan to an entity which is to acquire property

and conduct the business of an enterprise does not constitute taking the "initiative in founding and organizing" the business or enterprise and, therefore, does not confer "promoter" status.[120] More importantly the only offerings in which Dahl may have urged others to purchase are those in which his co-plaintiffs invested - the Doss 3-B and the Antwine 2-C. Those two wells were wells in which Pinter already had sold substantially all interests to his other investors and in which Dahl and his co-plaintiffs acquired the remaining interests which completed the offering. Those offerings in progress were offerings that were unregistered by Pinter "in reliance on Rule 146" and in which Dahl played no promotional part. Further, those leases were already owned by Pinter who already had completed his earlier securites offerings and had already drilled two wells upon the Doss lease and one well upon the Antwine lease. Only Pinter was responsible for any failure to register the offerings

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[120] Ingenito v Bermec Corporation (SDNY 1977) 77-78 CCH Dec. Fed.Sec.Law Rept. ¶96,214.

relating to the two Clark wells, the one Watkins well, the three Doss wells and the two Antwine wells. Pinter also was the only person responsible for using the nonpublic offering exemption and Rule 146 as a substitute for registering such offerings. Having been a promoter and licensed broker of oil and gas securities in Texas for twenty years would import Pinter had knowledge of his responsibility to register the securities offerings or to conduct their sales-distribution process in a manner consistent with Ralston Purina and/or Rule 146. The charaterization of Dahl as a "catalyst" means nothing more than that he was the substance that initiated the investment reaction in his co-plaintiffs - his friends, family and business associates. Despite such characterization of Dahl, the truth of the matter is that Pinter was the catalyst which initiated the investment reaction in Dahl with the "ripple effect" of Dahl's enthusiasm being conveyed to his friends, who then became investors.

The fact that Dahl was agressive in seeking oil and gas investments on his own behalf is no different than

the aggressiveness of any investor seeking an opportunity to invest. Wall Street thrives upon such aggressiveness; so do all our business enterprises. "Aggressiveness" and being a "catalyst" do not make one a "promoter", nor do such equate to "seller" status under §12(1). There is absolutely no evidence that Dahl had any pecuniary or other beneficial interest in these enterprises or ventures offered by Pinter other than that of a mere investor with a substantial investment and with an expectation that its promoter, Pinter, had provided him with all material information in a forthright manner so he could make an informed investment decision.

IV. THE EQUITABLE DEFENSES OF "ESTOPPEL" AND "IN PARI DELICTO" WILL BE AVAILABLE IN LIMITED SITUATIONS AS A BAR TO RECOVERY OF A PURCHASER'S ACTION UNDER SECTION 12(1) TO RESCIND HIS PURCHASE OF UNREGISTERED SECURITIES.

Securities laws are primarily for the purchaser. Where there is a violation of such laws that affects the purchaser, the purchaser is generally entitled to rescind his purchase transaction and recover the consideration he has paid. A defendant may seek to bar the purchaser's recovery upon the equitable defense of estoppel and/or in pari delicto. However fraud, illegality or any real form of unconscientous conduct connected with the matter in litigation "could deny that purchaser the equitable relief he seeks. Pomeroy on Equity Jurisprudence states at 143:[121]

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[121] A Treatise on Equity Jurisprudence, Pomeroy, Vol. II §404 (5th Ed. 1941).

> "A court of equity acts only when and as conscience commands; and, if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses, and whatever use he may make of them in a court of law, he will be held remediless in a court of equity. Misconduct which will bar relief in a court of equity need not necessarily be of such nature as to be punishable as a crime or to constitute the basis of legal action. Under this maxim, any willful act in regard to the matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean."

Generally a securities purchaser will not be deemed to be in pari delicto or subject to estopel in bar to his action unless his conduct is offensive to natural justice or is of equal fault with that of his adversary and there is no resulting harm to the public. Accordingly the general rule is to not permit such defenses to be raised. This follows from the universal proposition that "no action arises, in equity or in law, from an illegal contract. An exception is the in pari delicto rule - which rule in bar is narrowly construed, rigidly confined and subject to numerous limitations. One limitation on the use of in pari delicto is where permitting its use will conflict with public policy - thus

permitting the purchaser to obtain his relief. In this situation equity may yet aid a purchaser who is equally guilty with his adversary.[122] If refusal to rescind the illegal transaction would produce a harmful effect on the persons for whose protection the law provided by making the transaction illegal, rescission will be allowed.[123] Although the agreement or transaction may be illegal with both parties tainted, if both parties are not in pari delicto i.e.

> "both have not, with the same knowledge willingness and wrongful intent, engaged in the transaction, or the undertakings of each are not equally blameworthy, a court of equity, in furtherance of justice and of a sound public policy, will aid the one who is comparatively the more innocent and may grant him full affirmative relief . . . ."[124]

Permissive use of in pari delicto will normally be limited to situations where the plaintiff bears at least substantially equal responsibility for his own injury and he concurred in an illegal act. As Justice Fortas

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[122] Id. §940-41, PP. 725-35.
[123] Restatement of Contracts, §601, P.1116.
[124] Id. §942, P.738-39.

stated in his concurring opinion in Perma Life Mufflers, Inc. v International Parts Corp[125]:

> "Where two parties 'combined to formulate and operate a collusive scheme' such equality of position is necessary before in pari delicto may bar a remedy. Justice Marshall in Perma Life referred to it as where 'Plaintiff actively participated in the formation and implementation of an illegal scheme.'"[126] Justices Harlan and Stewart in that portion of their concurring opinion stated "plaintiffs who are truly in pari delicto are those who have themselves violated the law in cooperation with the defendant,[127] and when he suffers losses as a result of activities the law forbade him to engage in . . . ." (emphasis supplied).

Justices Harlan and Stewart then noted three situations which are distinct from in pari delicto - one is where X and Y enter into an illegal conspiracy to fix prices and Z, knowing of that conspiracy, purchases from X, Z is not in pari delicto "having committed no offense; the most that can be said is that he allowed an offense to be committed against him. * * * there should be no defense [of in pari delicto] in such situations, where the plaintiff has done nothing the law told him

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[125] 392 US 134 (1968).
[126] Id. at 149.
[127] Id at 153.

not to do."[128] Nor should "a person who engaged in a lawful business on the terms offered . . . be prevented from suing merely by his knowledge that others violated the law in contriving those terms [of an illegal agreement]."[129]

A. The in pari delicto defense will not be permitted in a §12(1) rescission action where the plaintiff merely has knowledge that the securities are unregistered. The parties must have combined to formulate and operate a collusive scheme to evade the requirements of §5 as to an effective registration statement or of §4(2) as to all conditions to be met for such exemption to be applicable.

In Can-Am Petroleum Co. v Beck, 331 F.2d 371 (10th Cir. 1964) the plaintiff had purchased unregistered fractional undivided oil and gas interests and later encouraged others to become investors purchasing similar interests and for which she received additional fractional interests as a form of commission. By assisting in selling others she had "adulterated" her

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[128] Id at 153.
[129] Id at 156.

position as a pure investor. Yet the court denied defendants' in pari delicto defense.[130]

The normal rule is that in pari delicto will not be an available defense in an action for fraud brought by the persons who expected to benefit from that conduct against his wrong-acting benefactor. Bateman Eichler continued to uphold this general rule and rejected the general availability of in pari delicto defense in a 10b-5 action by an injured tippee who acted upon inside information provided him by his tipper. In upholding the general rule denying the availability of in pari delicto defense Bateman Eichler expressed an exception to the normal rule. The exception is to be applied

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[130]The Can-Am court stated
". . . But an investor does not waive or lose the shelter of the Act because he becomes to some extent involved in the illegality of the security sales. The reason for such a rule has been aptly stated: 'In such event, since the policy of the law designed to discourage illegal agreements comes in conflict with that policy which demands the effective enforcement of the Corporate Securities Act, the law differentiates the guilt of the parties, because refusal of relief to the less culpable would involve harmful effects wholly out of proportion to the requirements of individual punishment or the discouragement of illegal contracts.' (Citations omitted).

only if permitting the in pari delicto defense meets a two pronged test, i.e. only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he [the plaintiff] seeks to redress and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public. Thus the facts of a case must support a conclusion that the plaintiff bears at least substantially equal responsibility in the underlying illegal transaction as a direct result of his own actions. If the facts affirmatively support such a conclusion (i.e. it is his own fault in fact) then the court must make a legal determination whether or not barring such suit would significantly interfere with effective enforcement and protection of the investing public.

Where the only basis for a defendant asserting in pari delicto is the purchaser's knowledge of the violation, such as that the securities he purchased were

unregistered, that doctrine should not apply.[131] The purchasers of securities may assume that the seller has complied with the law, and they are not in pari delicto unless they are shown to have had full knowledge and to have connived with the seller to violate the Act.[132] A Texas case, Smith v Fishback,[133] held that purchasers' lack of knowledge that promoter and his sales agents failed to comply with the Texas securities statute, in pari delicto did not apply and the purchaser was entitled to rescind

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[131] See Anno: Securities Acts-Violations-Estoppel, 84 ALR 2d 480. at 481 such annotation notes:
" . . . the mere fact that the sale violated securities regulations is not a sufficient basis for invoking the doctrine of pari delicto. The general rule is that the purchaser ordinarily is not in pari delicto with the seller. It is also the general view that a purchaser's knowledge that the contract is in violation of state securities regulations does not by itself render him equally guilty with the seller."
Randall v California Land Buyers Syn. 217 Cal. 594, 20 P.2d 331 (1933).

[132] Parmely v Boone 35 Cal. App. 2d 517, 96P2d 164 (1939). See also Hardy v Musicart Records 93 Cal. App. 2d 698,209 P2d. 839 (1949). (Purchasers blameless and not in pari delicto with seller. Duty on issuer to obtain permit to sell and no obligation on purchasers to ascertain if registered. Purchasers have right to assume securities laws complied with).

[133] 128 SW2d 771, err. ref. (Tex.C.A. 1938)

the transaction. In another Texas case, Brown v Cole,[134] the purchaser sued his seller where sale was without a permit and in violation of state securities statute. After purchasing his securities, the purchaser in turn made a proposal to the second plaintiff. Defendant seller argued the defense in pari delicto since plaintiff engaged in the "sale" to the second plaintiff. Held, the argument was unsound (1) because one person's violation does not excuse another (i.e. any sale by first plaintiff to second plaintiff did not relieve defendant on his sale to first plaintiff) and (2) as far as the sales were made to both plaintiffs, defendant was the principal actor.

Other factors to consider[135] are (a) the relationship of plaintiff's conduct to the defendant's security violation, such as plaintiff's knowing and active

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[134] 155 Tex. 624,291 SW2d 704 (1956). See also Williams Delight Corp.v. Harris 87 Mich.App. 202,273 NW2d 911 (1978) holding plaintiff's technical violations of the law were far outweighed by defendant's conduct in fafiling to make the corporation comply with securities law.

[135] Plaintiff's Conduct as Actor to Recovery Under the Securities Acts, In Pari Delicto, Godfrey, 48 Texas Law Rev. 181 (1969)

involvement bringing about the securities violation in issue (i.e. direct and equal involvement)[136]; purchaser became "sold" on the merits of investment and engaged in promotional efforts to persuade others to purchase (i.e. direct but unequal involvement);[137] (b) factors peculiar to the specific securities violation alleged by plaintiff, and (c) the capacity in which plaintiff is suing and the effect of a bar on the rights of innocent third parties.

As to Dahl's purchase of unregistered working interests in the Emanuel Clark, the Walter Clark and the Watkins 1-C wells, and as to his purchase of unregistered royalty interests in the two Clark leases, the only alleged wrongful conduct is Dahl's knowledge he was purchasing unregistered securities because the subscription agreement so stated.[138] Adopting Pinter's position as to Dahl would also mean none of the plaintiffs should have recovered under §12(1), because

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[136] Kuehnert v Texstar Corp., 412 F.2d 700 (5th Cir. 1969).
[137] Can-Am Petroleum, supra.
[138] See Subscription Agreement, J.A. A-95.

all of Pinter's subscriptions agreements stated they were unregistered under the Securities Act of 1933 in reliance on Rule 146. Henderson v. Hayden, 461 F.2d 1069 (5th Cir. 1973) specifically refused application of in pari delicto defense as not being beneficial to the overall purposes of the securities laws. Also, Congress clearly expressed itself by prohibiting any waiver of its statutory requirements when it adopted §14, Securities Act of 1933, 15 U.S.C. §77(n):

> "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void."

If the legislature provides that a buyer cannot waive the protection of the securities laws, and if Henderson provides one cannot be estopped in a §12(1) action by mere knowledge the securities he purchases are unregistered, should the courts do so under in pari delicto where the sole wrongful act is buying with knowledge it is unregistered? Further, where such knowledge is qualified by the issuer's (Pinter's) statement, "[i]n reliance of rule 146 thereunder", is

not such tantamount to an affirmative declaration that they are not required to be registered because all pre-conditions of Rule 146 have been met? Congress and the SEC have imposed the duty upon Pinter, the issuer, to comply either with registration or with the requirements of an available exemption. Pinter did not establish his compliance with Rule 146 and such compliance is required. There is nothing in the record in this case to show that Dahl knew Pinter had not complied with Rule 146, nor should have known a violation of §5 existed. See V., below, concerning equal fault.

B. The Eichler exception (permitting in pari delicto and requiring a showing that preclusion of suit does not significantly interfere with effective enforcement of securities laws and protecting the investing public) is not applicable to this case.

In a private suit for damages brought under a cause of action for violation of the securities laws the general rule is that a wrongdoer cannot avoid liability through in pari delicto. Eichler stated the only exception is where (1) a violation occurs to plaintiff's damage for which he must bear substantially equal responsibility

with the defendant as a result of plaintiff's own actions, and (2) preclusion of recovery by the claimant does not significantly interfere with the effective enforcement of securities laws nor the protection of the investing public. Dahl's acts of purchasing securities from Pinter are not acts violative of the §5(a) prohibition against the offer, sale and delivery after sale of unregistered securities.

Pinter has the duty to register securities for sale or to comply with the conditions for availability of an exemption, as such conditions have been announced by regulation or judicial decision. Pinter, the issuer, is the only person with the duty, or with the right,[139] to qualify for the exemption of Rule 146. Pinter did not deliver written material which complied with Rule 146 to Dahl, to the California plaintiffs, nor to the other investors he had in the involved leases and wells. Pinter denied he provided any material to Dahl to show to the California investors. Dahl said Pinter did

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[139]The Availability of Rule 146 is limited to the "issuer". It is not available to any other person connected with that exempted offering, not even Dahl.

provide some information but that it was false. During testimony Pinter did not know what a Form 146 was, what it contained or where it should be filed. Pinter was in violation of §5 before he dealt with Dahl or the California plaintiffs and continued to be in violation because he did none of the affirmative acts required to permit an issuer to not register in "reliance on rule 146". It was not the direct acts of Dahl that resulted in the violations, as required by Eichler.

Under the facts of this case The Fifth Circuit did not improperly use the Henderson standard for estoppel in an in pari delicto case. Pinter's appeal was based on the trial court allegedly not applying both "estoppel" and "in pari delicto" standards to bar recovery in a §12(1) case. Judge Hill sought to determine if the governing standard in Eichler had supplanted that utilized in Henderson. Having identified the key factor leading to the governing standard in Eichler as "plaintiff's own culpability" and having found Dahl not culpable, Judge Hill did not apply the Eichler standard of determining if barring recovery would not interfere

with effective enforcement of securities laws. He applied the Henderson standard as a continuing standard where the plaintiff only had knowledge the securities were unregistered but lacked culpability - thus the Fifth Circuit's conclusion that it was necessary under Henderson to determine if barring recovery under the unclean hands "estoppel" maxim would have the positive effect of furthering the goals of securities laws. Thus the Fifth Circuit first determined that Eichler did not change the standard to be applied to any affirmative defense raising an issue as to plaintiff's conduct. Henderson and Eichler both have the same objectives - not to interfere with one's private remedy for relief unless the claimant's injury results from his own conduct which is equally culpable with defendant as to a breach of legal duty or is morally reprehensible and, then, only if preclusion of suit will have a positive regulatory effect either by furthering the goals of securities laws (Henderson) or by not interfering with the effective enforcement of those laws and the protection of the public (Eichler).

Having found that Henderson was applicable in a §12(1) case where culpability is not the real issue, the Fifth Circuit then stated, "We believe that the Eichler court's analysis applies with equal force to the case at bar" and that the same result would be reached because Pinter made the first step in the dissemination of unregistered securities and he will be more responsive to the deterrent pressure of potential sanctions while barring Dahl would "inexorably result" in a number of unregistered issues of securities going undetected and unremedied by the authorities. Further, permitting recovery under §12(1) is unlikely to induce Dahl or others similarly situated to enter into illegal transactions involving the issue and sale of unregistered securities. To hold otherwise would be more likely to permit those of Pinter's ilk to continue to affirmatively recite their reliance upon an exemption, without attempting to meet the conditions of that exemption, all as a means of avoiding the registration requirements imposed by the legislature. Not registering securities and then selling them in violation of §5 is the prohibited

conduct. Asserting to the world that the benefits of registration are not provided in reliance upon an exemption where no attempt whatsoever was made to comply with the conditions of the exemption is unquestionably culpable conduct which should be deterred. The required "benefits" of that registration are also the required "benefits" of that exemption; i.e. to provide information to a prospective investor. Rarely, if at all, is a duty imposed upon a buyer to determine if all conditions of an exemption from registration have been met; a duty is so implied only where the buyer consciously and knowingly participates in effecting a wrongful act such as where the purchaser knowingly joins in a scheme to participate in an illegal distribution of securities in violation of a securities statute. See Ladd v Knowles, 505 S.W.2d 662 (Tex. C.A.-Amarillo, 1974). Dahl's conduct was not willful misconduct nor morally reprehensible as to known facts. See a-9, ¶4. The Fifth Circuit applied the Henderson standard because it found no culpability. The Eichler standard requires equal culpability. Even

applying Eichler standards to the facts of this case the court of appeals found "Causation . . . does not create unclean hands nor does equal causation constitute equal fault." See a-9, ¶5. Thus even should Dahl be deemed a "seller", he would not be an "equal fault" seller.

V. EVEN IF DAHL IS DEEMED A "CO-SELLER" TO THE CALIFORNIA PLAINTIFFS, DAHL'S ACTS WERE NOT OF "EQUAL FAULT" TO THOSE OF PINTER, AND DAHL'S ACTION SHOULD NOT BE BARRED.

In pari delicto requires equal fault. Equal fault does not relate merely to the act of selling - it also relates to the violation of the registration provisions and, in this case, to the failure to comply with the conditions precendent to make available the non-public offering exemptions of §4(2) and Rule 146. Pinter was an experienced oil and gas securities broker and dealer,

having been so licensed in Texas for twenty years.[140] He knew securities must be registered or an exemption established. He knew Dahl could not be his sales agent unless Dahl himself was licensed as a salesman for Pinter or some other licensed broker-dealer. Under Rule 146, if Dahl was a salesman for Pinter, then Pinter had a duty to disclose such information to the California purchasers. If Dahl was the representative of the California purchasers, Pinter had a duty to disclose any relationship he had with Dahl, any understandings as to commissions or any form of compensation,[141] and was required to obtain a written acknowledgment from each purchaser that Dahl was his representative. Where Pinter offered or sold the

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[140] Bateman Eichler noted there are "important distinctions between the relative culpabilities of tippers, security professionals, and tippees" and that an investor trading on inside information is not necessarily as blameworthy as an insider or broker-dealer, - that a person whose duties are derivative cannot be as culpable as the person whose breach of direct duties gave rise to that liability in the first place.

[141] It was earlier noted that Pinter promised to pay a commission to Geral Owens if he brought Mr. Adams in as an investor. Adams was a non-party witness for plaintiffs.

same or similar class of securities within six months preceding this offering, Rule 146 was not available.[142] Under Rule 146 Pinter could not engage in general solicitations. See ¶(c) "Limitation on Manner of Offering", Rule 146. Pinter was required to believe, after making reasonable inquiry, that each offeree was capable of evaluating the merits and risks of the prospective investment or was able to bear its economic risk. See ¶(d) "Nature of Offerees", Rule 146. Most importantly, Rule 146, ¶(e), "Access to or Furnishing of Information", requires that each offeree have access to or "be furnished during the course of the transaction and prior to sale, by the issuer or any person acting on [the issuer's] . . . behalf, the same kind of information that is specified in Schedule A of the Act . . . ." - being the information that would be required to be included in a registration statement. Pinter also had a duty to determine the "number of purchasers" (¶(g), Rule 146, and to file Form 146, a

142See ¶(b)(1), Rule 146.

Report of Offering", with the Regional Office of the SEC at the time of his first sale. See ¶(i), Rule 146.

The preliminary notes to Rule 146 make it clear that these and other duties are those of the issuer and not those of the purchaser nor of a person who knows of prospective purchasers. Thus:

> "3. * * * The courts and the Commission have interpreted the Section 4(2) exemption to be available for offerings to persons who have access to the same kind of information that registration would provide and who are able to fend for themselves. * * * Rule 146 is designed to provide, to the extent feasible, objective standards upon which responsible businessmen may rely in raising capital . . . .
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> " . . . the issuer claiming the availability of the rule has the burden of establishing, in an appropriate forum, that it has satisfied . . . [all the conditions of the rule] with respect to each offeree as well as to each purchaser."
>
> " * * * all offers . . . or sales . . . must meet all of the conditions of Rule 146 for the rule to be available. * * * "
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> "6. The rule is available only to the issuer . . . and is not available to affiliates or other persons for sales of the issuer's securities."

If Pinter and Dahl did not have equal duties to register the securities or to fulfill the requirements of the exemption by providing the "benefits" of that

exemption or registration, how can they be of substantially equal fault in failing to comply with either §5 requiring registration or with §4(2) and Rule 146 which require the equivalent alternative to registration? The proscribed conduct under §5 is the sale of an unregistered security. Congressional intent was not to protect the investing public from the sale of securities, but to protect them from the foisting off of securities without full disclosure of all material information.

The statement that the securities are unregistered "[i]n reliance on rule 146" is a representation to each prospective investor that the benefits of the exemption of Rule 146 are being made available to that prospect and that full disclosure of all material information is being made.

As required by Doran v. Petroleum Management Co., Pinter did not establish evidence concerning compliance with the exemption as to each investor in each well as is required by the Rule 146 and as enunciated in

Doran v. Petroleum Management Co.[143] Pinter made no effort to establish the availability of and compliance with the exemption of §4(2) and/or Rule 146.

Analogous to the case at hand is Malampy v. Real-Tex Enterprises, Inc.,[144] an unregistered securities case, which held that the in pari delicto defense was available and equal guilt would bar recovery where the purchaser was a culpable participant knowingly soliciting fraudulent contracts, but that such defense does not bar recovery by a defrauded purchaser who naively urges others to invest. See also Lawler v. Gilliam[145]. As Judge Hill for the Fifth Circuit stated for the majority in this case:

> " * * * The doctrines [of unclean hands and in pari delicto] apply "only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity he seeks in respect to the matter in litigation." . . . [those] maxims operate against conduct which is contrary to the dictates of good conscience or fair dealing. * * * [they] refer to "willful misconduct rather than to merely negligent conduct. The improper conduct . . . must involve

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[143] 545 F.2D 893 (5th Cir. 1977).
[144] 527 F.2d 978 (4th Cir. 1975).
[145] 569 F.2D 1283, (4th Cir. 1978).

intention as opposed to an inadvertent act or a misapprehension as to known facts." See p. a-9.

And at p. a-9 he continues, "Causation . . . does not create unclean hands nor does equal causation constitute equal fault."

VI. STRICT LIABILITY OF PINTER

Strict liability is imposed under §12(1) because Congress saw the need to protect investors. To meet that need Congress established a standard of conduct. Knowing that a seller of securities is normally acting for his own purposes and is seeking a benefit or a profit from his activities, Congress decided to impose the liability upon the person creating what it deemed to be an undue risk upon society - liability resulting from social engineering as to who can and should bear and afford the risks associated with any departure from that standard of conduct.[146] The standard of conduct

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[146] "In fact, legal fault upon which liability is based has little connection with personal morality or with justice to the individual; it is always tinctured with a supposed expediency in shifting the loss from one harmed to one who has caused the harm by acting below the standard imposed by the courts or legislators." Seavey, Speculations as to "Respondent Superior," Harvard Legal Essays, 1934, 433, 442.

imposed was the requirement to provide (disclose) materially important information about the securities offering and its issuer's business affairs. Congress deemed the information contained in Schedule A of the Securities Act to be the minimum general requirement of material information for disclosure. Failure to meet the duty of having an effective registration statement bars the privilege of using the mails and interstate commerce to effect a sale or delivery of a security. The violative conduct can be viewed as using a privilege which has been withdrawn to effect a sale, or it can be viewed as the breach of duty. Protection of the public was intended to be accomplished by imposing the duty, the absence of performance of which results in punishment by withdrawal of the privilege and imposing liability where the conduct, once privileged, is effected.

Pinter also alleged he was induced to permit Dahl to "sell" the securities to a small sophisticated group. Interestingly, by its own terms Rule 146 is available

only to "issuers",[147] not to "other sellers". The exemption could not be utilized by Dahl or Pinter's claimed exemption would have been destroyed.

It appears incongruous that most §11 violaters, §12(2) "sellers", and other persons who may be "controlling persons", "aiders and abettors", "co-conspirators" and "participants in a scheme to defraud" are entitled to avoid liability by showing due care or perhaps lack of knowledge, while a collateral participant acting gratuitously, without any apparent duty to such persons, faces potential strict liability. Such a result is certainly not by Congressional directive. Any such result would be morally reprehensible.

In the instant case there is danger of Pinter circumventing the stuatutory scheme by permitting a knowing, violative issuer/owner-seller to avoid or to reduce his liability, to keep funds Congress intended for him to disgorge, by asserting a collateral

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[147] Release No. 33-5487, April 23, 1974, 39 F.R. 15731, 1 CCh Fed. Sec. Law Reports ¶2701, "Rule 146 - Transactions By An Issuer Deemed Not To Involve Any Public Offering."

participant was a substantial factor in causing the purchaser to buy the security from that issuer/owner. Permitting Pinter to obtain a windfall gain by allowing in pari delicto upon such theories would encourage continued violations by Pinter and others similarly situated.

CONCLUSION

1. The trial record clearly establishes that Dahl's sole interest in discussing his ivestment with his friends was to share his believed good fortune; he had no financial or economic benefit or motive. Dahl was not a promoter of any of the ventures in which his co-plaintiffs invested. Dahl had no responsibility or authority as to a decision to not register the securities nor to conduct the offering in a manner requiring registration. The indicia utilized to identify a promoter do not apply to Dahl and his activities and investments with Pinter.

Accordingly, this matter need not be remanded for further findings.

The judgment of the Court of Civil Appeals should be affirmed.

Premises considered, Respondent respectfully prays that this Honorable Court affirm the decision of the United States Court of Appeals for the Fifth Circuit.

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Certificate of Service

I hereby certify that on this 28th day of October, 1987, three true and correct copies of the foregoing Brief On The Merits of Respondent were sent, certified mail, return receipt requested, to the office of Petitioner's counsel of record at his address as follows: Braden W. Sparks, 2940 Lincoln Plaza, 500 North Akard, Dallas, Texas 75201.

John A. Spinuzzi

AMICUS CURIAE

BRIEF

No. 86-805 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1987

BILLY J. "B.J." PINTER, ET AL., PETITIONERS

v.

MAURICE DAHL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether, and under what circumstances, the defense of *in pari delicto* bars a claim under Section 12(1) of the Securities Act of 1933, 15 U.S.C. 77*l*(1), for the unlawful sale of unregistered securities.

2. Whether a person must have sought or received a financial benefit in order to be liable under Section 12(1).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued: Page

Cases—Continued: Page

Statutes and rule: Page

Statutes and rule—Continued: Page

Miscellaneous:

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INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission (SEC), is the agency responsible for the administration and enforcement of the federal securities laws, including the Securities Act of 1933, 15 U.S.C. 77a *et seq.* This case involves questions concerning the availability of relief, and the range of persons liable, under Section 12(1) of the Securities Act, 15 U.S.C. 77*l*(1), which affords a private remedy of rescission for violations of the registration provisions of that Act. Private actions brought by investors under the securities laws serve as a "'necessary supplement'" to the Commission's own enforcement efforts. *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 310 (1985) (quoting *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964)). The Commission is concerned that the availability and coverage of the private remedies be properly determined in accordance with congressional intent. The Commission is also interested in

ensuring that restrictions on the scope of the private remedy under Section 12(1) are not improperly applied to limit the Commission's own enforcement actions for violations of the registration provisions.

STATEMENT

Petitioner Billy J. "B.J." Pinter, doing business as Black Gold Oil Company (Pinter), is an oil and gas producer in Texas and Oklahoma (Pet. App. 31). Respondent Maurice Dahl purchased certain securities—viz., fractional undivided interests in oil and gas leases—from Pinter (*ibid.*). Dahl, together with eleven other persons who, at Dahl's urging, also bought such interests from Pinter (*id.* at 32, 34, 35), filed this action in the United States District Court for the Northern District of Texas, alleging, inter alia, that because the oil and gas interests had not been registered with the Securities and Exchange Commission, the sales violated Section 5 of the Securities Act of 1933, 15 U.S.C. 77e. Plaintiffs claimed that, under Section 12(1) of the Act, 15 U.S.C. 77*l*(1), they were therefore entitled to rescission of the sales. The issues in this case are (1) whether certain activities of Dahl in connection with the securities sales preclude him from recovery by affording Pinter a valid *in pari delicto* defense and (2) whether Dahl is himself liable under Section 12(1) to the eleven other plaintiffs (and therefore, the parties assume, subject to a contribution claim against him by Pinter).

1. Respondent Dahl is a California real estate broker and investor (Pet. App. 30). He also invested in oil deals and in 1980 and 1981 formed two closely held corporations to acquire and hold royalty and working interests in oil and gas properties (*id.* at 31). Dahl hired an oilfield expert to locate oil and gas leases for him (*ibid.*). The expert introduced Dahl to petitioner Pinter (*ibid.*), who, according to the brief in opposition to certiorari, had been a licensed oil and gas securities broker-dealer in Texas for 20 years (Br. in Opp. 6). Pinter told Dahl that he could acquire the oil and gas leases Dahl sought (Pet. App. 32). Dahl loaned Pinter $20,000 to do so, with the understanding that the leases would be held in the name of Pinter's Black Gold Oil Company and that Dahl would have a right of first refusal to drill certain wells in the future (*ibid.*).

Pinter found the leases as promised. Dahl toured the properties several times and reviewed the geology and the drilling logs and production history assembled by Pinter (Pet. App. 32). Dahl concluded, in the words of the district court, that "there was no way to lose" (*ibid.*).

Dahl thereupon urged his friends and family [1] in California to invest in the property by purchasing undivided fractional working interests and oil and gas rights from Pinter (Pet. App. 32). At least eleven such persons, Dahl's co-plaintiffs in this lawsuit, did so (*id.* at 32-33). Except for Dahl and one other plaintiff, none of the plaintiffs ever spoke to or met Pinter or toured the property (*id.* at 32, 34). Dahl invested approximately $310,000; the other 11 plaintiffs invested about $7,500 each (*id.* at 32-33).[2] Dahl received no commissions or other compensation in connection with their purchases (*id.* at 34).

The oil and gas interests were never registered with the Commission (Pet. App. 33). The purchase agreements stated that the interests were being sold "without the benefit of registration under the Securities Act of 1933, as amended, and on reliance of [SEC] rule 146 thereunder" (Br. in Opp. App. 39). The interests subsequently proved worthless (Pet. 4).

2. Dahl and his eleven co-purchasers brought suit against Pinter. They alleged that Pinter made material misrepresentations regarding the oil and gas properties and his oil experience, thereby entitling them to dam-

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[1] According to the brief in opposition, these persons included Dahl's fiancee, his brother, his accountant, his partner in a construction business, the bank officer handling his construction loans, his construction financier, his construction-business insurance agent, and other businessmen whom Dahl had known "since * * * grammar school" (Br. in Opp. 5, 8).

[2] Persons other than the plaintiffs also purchased interests from Pinter (see Pet. App. 32-33).

ages under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder (15 U.S.C. 78j(b); 17 C.F.R. 240.10b-5) and to rescission under Section 12(2) of the Securities Act (15 U.S.C. 77*l*(2)). They also sought rescission under Section 12(1) of the Securities Act (15 U.S.C. 77*l*(1)) for the sale of unregistered securities.[3]

In a counterclaim for fraud, Pinter alleged, among other things, that Dahl misrepresented the investment sophistication of himself and the other plaintiffs (Br. in Opp. App. 46-47) and falsely assured Pinter that he would provide the other investors with all information necessary for evaluation of the investment (*id.* at 48-49). Pinter further alleged that Dahl had agreed to raise the money for the project from these investors and that Pinter would simply be the "operator" of the wells (*ibid.*). Pinter apparently was contending that Dahl was responsible for the loss of the private-offering exemption from registration under Section 4(2) of the Securities Act, 15 U.S.C. 77d(2). Pinter also asserted, on the basis of the same factual allegations, that Dahl's suit was barred by the equitable defenses of *in pari delicto* and estoppel (Br. in Opp. App. 45).

The district court, after a bench trial, found that the oil and gas interests were not exempt from registration (Pet. App. 37). The court also found the evidence insufficient to sustain Pinter's counterclaim against Dahl (*id.* at 38). In so finding, the court apparently also rejected the equitable defenses. As a result, the court ruled that the plaintiffs were entitled to rescission pursuant to Section 12(1).[4]

3. The court of appeals affirmed the district court's judgment (Pet. App. 15). The court first held that Dahl's

[3] In addition, the plaintiffs asserted pendent claims under Texas and California law (Pet. App. 36).

[4] In view of its decision under Section 12(1), the court did not decide the Section 12(2) claim (Pet. App. 37-38). The court rejected the claim under Section 10(b) and Rule 10b-5 on the ground of Pinter's lack of scienter (Pet. App. 35).

involvement in the sales to his co-plaintiffs did not give Pinter an *in pari delicto* or estoppel defense to Dahl's recovery (*id.* at 9-10, 12). The court's reason for rejecting the *in pari delicto* defense, apparently, was that the defense is not available in an action under Section 12(1) because that section provides for strict liability rather than liability based on scienter (see Pet. App. 9-10). The court distinguished this Court's recent decision concerning the *in pari delicto* defense, *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299 (1985), on the ground that *Berner* was brought under the antifraud provisions of Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), which does require proof of scienter (*Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976)).[5]

The court next considered whether Dahl was himself a "seller" of the oil and gas interests within the meaning of Section 12(1), for if he was, the court assumed, he could be held liable in contribution for the other plaintiffs' claims against Pinter.[6] Citing Fifth Circuit precedent, the court stated that a Section 12 "seller" includes not only the owner of the securities but also any person who is a "substantial factor in causing the transaction to take place" (Pet. App. 13). The court had "no difficulty finding that Dahl's conduct was a 'substantial factor' in causing the other plaintiffs to purchase securities from Pinter" (*ibid.*). Nevertheless, the court declined to hold Dahl a "seller" (*ibid.*). In the court's view, "a rule imposing liability (without fault or knowledge) on friends and family members who give one another gratuitous advice on investment matters unreasonably interferes with well-established patterns of social discourse"

[5] The court also rejected Pinter's estoppel defense (Pet. App. 12). That ruling is not challenged in this Court.

[6] It is not clear whether the contribution issue was properly before the court of appeals. Pinter never filed a claim for contribution, although he did seek, and was denied, permission to realign Dahl as a third-party defendant. We assume that the question of Dahl's liability under Section 12(1) is properly presented in this Court.

(*id.* at 14). Accordingly, the court refused to impose liability on Dahl "for mere gregariousness" (*ibid.*) and concluded that a Section 12 seller must have "received or hoped to receive some financial benefit from his efforts" (*ibid.*). The court stated, somewhat more broadly, that a Section 12 seller must "be motivated by a desire to confer a direct or indirect benefit on someone other than the person he has advised to purchase" (*ibid.*).

In a dissent, Judge Brown expressed the view that Dahl's conduct "transformed" him into a "seller" of the unregistered securities, thereby "put[ting] him in the same boat as Pinter" (Pet. App. 16). Judge Brown concluded that, because Dahl was a "catalyst" for the entire transaction and knew the securities were unregistered (*id.* at 19), Dahl's suit should be barred by the doctrine of *in pari delicto*, and Pinter should be permitted contribution (*id.* at 19, 23 n.5).

The court of appeals denied rehearing en banc by a vote of eight to six (Pet. App. 26). In the dissent from that denial, Judge Jones criticized the decision of the panel majority. In her view, the majority opinion (1) "change[d] the law regarding the definition of a 'seller' of securities" by adding the financial-benefit requirement (*ibid.*) and (2) improperly refused to apply *Berner*, apparently on the ground that *Berner* is limited to fraud actions (Pet. App. 27). This Court granted Pinter's petition for a writ of certiorari on April 20, 1987.

SUMMARY OF ARGUMENT

Liability under Section 12(1) of the Securities Act is "*in terrorem*," intended "to guarantee that the risk of [its] invocation will be effective * * *" (Douglas & Bates, *The Federal Securities Act of 1933*, 43 Yale L.J. 171, 173 (1933) (footnote omitted; emphasis in original)). Under the section, a person who offers or sells a security in violation of the registration provisions of the Act is strictly liable in rescission to a person who purchased from him. The strict liability nature of the statute requires, on the one hand, that common law or equitable defenses rarely be available to wrongdoers and, on the

other hand, that the statute be carefully construed so as not to impose liability on persons other than those intended by Congress.

1. The court of appeals held, apparently on the basis of the statute's imposition of strict liability, that the *in pari delicto* defense should almost never be available in actions under Section 12(1). The principal rationale for the *in pari delicto* defense, however, is that even where the defendant is a wrongdoer there are certain circumstances where, because of the plaintiff's own wrongdoing, deterring the plaintiff's misconduct by precluding suit better serves the statutory purposes than deterring the defendant's misconduct by allowing recovery. This rationale applies to actions under Section 12(1), though in fairly narrow circumstances. The Commission believes that suit against the issuer under Section 12(1) should be barred by the *in pari delicto* defense where (1) the plaintiff is himself primarily a promoter of, rather than an investor in, the securities offering, and (2) the plaintiff bears at least substantially equal responsibility for the issuer's failure to register the securities or for the decision to conduct the offering in a manner that required registration.

2. With respect to the range of persons liable under Section 12(1), the Commission believes that a person other than the person who passed title to the securities may be held liable under Section 12(1), but only if he solicited the buyer's purchase, *i.e.*, urged the buyer to purchase, motivated in significant part either by his own financial interests or by those of the owner. In such circumstances, it is fair to say, in the words of Section 12, that the buyer "purchas[ed the] security from him." The Commission agrees with the court of appeals that Congress could not have intended that a person would be subject to strict liability for rescission merely because he attempted to be helpful to a friend by urging—even strongly or enthusiastically—that the friend make a securities purchase.

The Commission disagrees with the court of appeals' underlying reasoning—developed in prior cases in that

court—that Section 12 imposes liability on any person who is a "substantial factor" in the sale in question. Rather, liability may be imposed under Section 12 on only two categories of persons: those who own the security and pass title to the purchaser, and those who solicit the purchase.

Persons who are not liable for rescission under Section 12 may nonetheless be appropriate defendants in suits brought by the Commission under Section 5. Commission actions do not require a completed sale and are not limited by the language in Section 12 that restricts liability to those persons from whom the buyer purchased the security. The class of persons who may be said to "offer or sell" a security in violation of Section 5 is broader than the class of persons "from" whom the buyer "purchased" a security. In addition, the Commission is authorized by statute to bring an action against persons who "directly or indirectly" violate the registration provisions. Finally, as a matter of policy, injunctive relief (the principal relief in Commission actions) should be available against collateral participants who should not be liable for rescission.

ARGUMENT

I. THE *IN PARI DELICTO* DEFENSE IS AVAILABLE IN LIMITED CIRCUMSTANCES IN AN ACTION UNDER SECTION 12(1) OF THE SECURITIES ACT

A. The *In Pari Delicto* Defense Is Available In Actions Under Section 12(1)

In *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 at 310-311, this Court addressed the availability of the *in pari delicto* defense in an action brought under the antifraud provisions of Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5. The Court held the defense available in narrow circumstances: "where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly

interfere with the effective enforcement of the securities laws and protection of the investing public" (472 U.S. at 310-311).

The court of appeals in the present case refused to apply the *Berner* standard. The court noted that *Berner* involved an action requiring proof of scienter, whereas the present action involves Section 12(1), which imposes liability without regard to fault. Although its reasoning is far from clear, the court apparently concluded that the *in pari delicto* defense is not applicable in actions based on strict liability.[7] Indeed, according to the dissent, the majority suggested that "the general *in pari delicto* rules espoused * * * [in *Berner*] are limited to a § 10(b) action * * *" (Pet. App. 21-22 n.4).

Contrary to the view of the court of appeals, there is no reason to limit the *in pari delicto* defense to actions requiring proof of scienter. The defense has traditionally been applied to any action based on conduct that "transgresses statutory prohibitions * * *" (2 Restatement of Contracts § 598 comment *a* (1932)).[8] Moreover, the doctrine of *in pari delicto* rests on the premise that, in certain circumstances, "denying judicial relief to an admitted wrongdoer is an effective means of deterring

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[7] The court of appeals would permit the *in pari delicto* defense in a Section 12(1) action where the plaintiff's conduct is " 'offensive to the dictates of natural justice' " (Pet. App. 9-10 (citation omitted)). Since the gravamen of a Section 12(1) violation is a failure to register securities, it is hard to imagine a plaintiff's conduct that is both directly related to that failure (as *Berner* requires (see 472 U.S. at 310)) and, at the same time, offends "the dictates of natural justice." Accordingly, we read the court's opinion essentially to preclude the defense in Section 12(1) actions. The question presented in the petition is "[w]hether the common law *in pari delicto* defense is available in a private action for rescission of the sale of unregistered securities brought under § 12(1)" (Pet. i).

[8] See generally 14 S. Williston, *A Treatise on the Law of Contracts* §§ 1628, 1629 (3d ed. 1972); Comment, 53 Minn. L. Rev. 827, 828 (1969) (footnote omitted) ("*In pari delicto* * * * denies recovery * * * to an active participant in an illegal or morally delinquent scheme.").

illegality" (*Berner*, 472 U.S. at 306 (footnote omitted)). See also *McMullen* v. *Hoffman*, 174 U.S. 639, 669-670 (1899). The need to deter illegality on the part of the plaintiff is not eliminated simply because the statute making the parties' conduct illegal imposes strict liability rather than requiring intentional or negligent wrongdoing. Regardless of the standard of conduct, there are circumstances in which the statutory objective of deterring illegal conduct is better served by precluding suit than by allowing it.

The courts have not limited the *in pari delicto* defense to actions based on statutes requiring proof of scienter. The defense has been recognized in cases involving other strict-liability statutes. See, *e.g.*, *Ufitec, S.A.* v. *Carter*, 20 Cal. 3d 238, 249-250, 571 P.2d 990, 996-997, 142 Cal. Rptr. 279, 285-286 (1977) (action for violation of Federal Reserve margin requirements); *Miller* v. *California Roofing Co.*, 55 Cal. App. 2d 136, 130 P.2d 740 (1942) (sale of stock without permit from state corporation commission); *Ryan* v. *Motor Credit Co.*, 130 N.J. Eq. 531, 23 A.2d 607 (Ch. 1941), aff'd, 132 N.J. Eq. 398, 28 A.2d 181 (1942) (violation of usury laws).[9] And most courts have recognized it in cases brought under Section 12(1) itself. Although there are relatively few reported decisions under Section 12(1) that involve the *in pari delicto* defense, and although the defense has rarely succeeded on the facts of particular cases, courts of appeals other than the court below—indeed, even other decisions of the Fifth Circuit—have recognized that the defense is available. See *Can-Am Petroleum Co.* v. *Beck*, 331 F.2d 371, 373-374 (10th Cir. 1964); *Katz* v. *Amos Treat & Co.*, 411 F.2d 1046, 1054 (2d Cir. 1969); *Woolf* v. *S. D. Cohn & Co.*, 515 F.2d 591 (5th Cir. 1975),

[9] In product liability cases, where liability may also be imposed without regard to fault, the courts have long weighed the relative responsibility of the defendants in the chain of distribution in order to resolve their indemnity claims. See, *e.g.*, *Rabatin* v. *Columbus Lines, Inc.*, 790 F.2d 22 (3d Cir. 1986); *Chamberlain* v. *Carborundum Co.*, 485 F.2d 31, 34 (3d Cir. 1973).

vacated on other grounds, 426 U.S. 944 (1976); *Malamphy* v. *Real-Tex Enterprises, Inc.*, 527 F.2d 978 (4th Cir. 1975); *Lawler* v. *Gilliam*, 569 F.2d 1283 (4th Cir. 1978); *Wolfson* v. *Baker*, 623 F.2d 1074 (5th Cir. 1980), cert. denied, 450 U.S. 966 (1981). Commentators too have suggested that the defense should be available under the proper circumstances in actions under Section 12(1).[10]

B. In A Section 12(1) Action Against The Issuer, The *In Pari Delicto* Defense Should Be Available Where (1) The Plaintiff Is Primarily A Promoter Of, Rather Than An Investor In, The Securities Offering, And (2) The Plaintiff Bears At Least Substantially Equal Responsibility For The Issuer's Failure To Register The Securities Or For The Decision To Conduct The Offering In A Manner That Required Registration

The bounds of the *in pari delicto* defense in actions under the securities laws generally, and in actions under Section 12(1) in particular, should be narrowly drawn. See *Berner*, 472 U.S. at 309-310; *Perma Life Mufflers, Inc.* v. *Int'l Parts Corp.*, 392 U.S. 134, 138 (1968). The registration requirements are the heart of the 1933 Act, and Section 12(1) imposes strict liability for violating those requirements. The threat of liability under Section 12(1) is an important enforcement tool.

> Since unregistered offerings * * * do not generally attract the attention of regulatory agencies before sale, private suits play a particularly important role in the enforcement of the registration requirement. "[I]n many instances, particularly those involving relatively small distributions, the private suit is the only effective means of detecting and deterring

[10] See, *e.g.*, Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution*, 120 U. Pa. L. Rev. 597, 662-663 (1972); Comment, *Plaintiff's Conduct as a Bar to Recovery Under the Securities Acts: In Pari Delicto*, 48 Tex. L. Rev. 181, 192-194 (1969); Note, *In Pari Delicto Under the Federal Securities Laws*: Bateman Eichler, Hill Richards, Inc. v. Berner, 72 Cornell L. Rev. 345, 362 (1987).

> wrongdoing on the part of issuers and their agents or underwriters who have not registered the securities being offered for sale."

Lawler v. *Gilliam*, 569 F.2d 1283, 1293 (4th Cir. 1978) (quoting *Woolf* v. *S.D. Cohn & Co.*, 515 F.2d at 605).[11] To give this statutory enforcement mechanism its full intended effect, the *in pari delicto* defense must be limited to those situations where precluding suit under Section 12(1) serves the statutory goal more effectively than permitting recovery. See *A.C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U.S. 38, 43-44 (1941).

In most cases, the deterrence goal of the statute is best achieved by permitting the suit to proceed. In certain circumstances, however, deterring the plaintiff's misconduct by barring suit better serves the statutory goal than deterring the defendant's misconduct by allowing recovery. As *Berner* recognized, the defense is thus justified only when two conditions are present: (1) precluding suit would not impair the effective enforcement of the securities laws; and (2) the plaintiff, "as a direct result of his own actions," is at least equally responsible for the violations he alleges. *Berner*, 472 U.S. at 310-311. These two requirements, as applied to Section 12(1), imply that the *in pari delicto* defense may defeat recovery only where

[11] Section 12(1)'s deterrent effect is, to a great extent, achieved by the one-year statute of limitations, which allows the purchaser of unregistered securities to keep his securities and reap his profit if the securities perform well during the year, but to rescind the sale if they do not. Thus, the concern expressed by the dissent in the court of appeals, that disallowing *in pari delicto* permits purchasers to "plac[e] themselves in a no-lose situation" (see Pet. App. 24) is not justified: that is the design of the statute. See Shulman, *Civil Liability and the Securities Act*, 43 Yale L. J. 227, 246-247 (1933); accord, 3 L. Loss, *Securities Regulation* 1777 n.326 (2d ed. 1961 & Supp. 1962); see also *Straley* v. *Universal Uranium & Milling Corp.*, 289 F.2d 370 (9th Cir. 1961) (Where purchasers learned of a violation of the registration provisions within two months after their purchase, but waited to bring an action under Section 12(1) until the day before the statute of limitations ran to see whether the action would be to their advantage, suit was not barred by the equitable doctrine of laches.).

the plaintiff is more a promoter than an investor and is at least equally responsible for the failure to register or the failure to meet the conditions for an exemption from registration.[12]

1. *Berner*'s refusal to recognize the *in pari delicto* defense where doing so would undermine the effective enforcement of the securities laws was consistent with the well-recognized principle that the defense cannot be invoked to defeat recovery by a person who is primarily a member of the class the statute was enacted to protect. Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, 95 U. Pa. L. Rev. 261, 270 (1947); see *A.C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U.S. at 43 n.2. Section 12(1) is designed to protect investors (312 U.S. at 43; *SEC* v. *Ralston Purina Co.*, 346 U.S. 119, 124 (1953)). It follows that where the plaintiff is primarily an investor, denying a defense of *in pari delicto* "will best promote the primary objective of the federal securities laws—protection of the investing public * * *" (*Berner*, 472 U.S. at 315).

Courts considering the *in pari delicto* defense in actions under Section 12(1) have allowed the defense where the plaintiff was more a promoter than an investor. For example, in *Athas* v. *Day*, 186 F. Supp. 385, 389 (D. Colo. 1960), the court barred recovery after concluding that the plaintiff's own investment was incidental to his active

[12] There may also be cases where, although *in pari delicto* does not apply, equitable estoppel may bar the plaintiff's recovery. See 3 J. Pomeroy, *A Treatise on Equity Jurisprudence* § 803, at 187 (5th ed. 1941). For example, in *The Value Line Fund, Inc.* v. *Marcus*, [1964-1966 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,523, at 94,953 (S.D.N.Y. Mar. 31, 1965), the plaintiff, an experienced investment advisor, assured the defendant-seller that he had thoroughly examined the company's records and would hold unregistered securities for investment only. The court therefore held that the plaintiff was estopped from denying that the sale was a private offering, stating that "[t]o hold otherwise would allow plaintiffs to profit from their own wrong and at the expense of an innocent and, indeed, misled party" (*id.* at 94,971). As previously noted (note 5, *supra*), in the present case, the question of estoppel has not been presented in this Court.

participation in a plan to acquire and distribute unregistered stock to third persons. The court said that "[i]t cannot be successfully contended that [plaintiff] was a victim rather than a participant in the plan to dispose of [unregistered] * * * stock." In contrast, in *Can-Am Petroleum Co.* v. *Beck*, 331 F.2d 371 (10th Cir. 1964), the court held that, even where the plaintiff actively participated in the distribution of unregistered securities, his suit under Section 12(1) was not barred when his promotional efforts were incidental to his role as an investor.[13]

Whether a plaintiff is primarily a promoter rather than an investor obviously depends in part on the size of his own purchases compared to those of third parties solicited by him. Compare *Can-Am Petroleum Co.* v. *Beck*, *supra*, with *Athas* v. *Day*, *supra*. Where the plaintiff assists in sales to others in volumes that greatly exceed his own purchases, or that constitute the majority of total sales in the offering, a court may well conclude that the plaintiff was primarily promoting the offering. In that situation, his own conduct will presumably have caused more harm than he himself suffered, and precluding his suit may serve the statutory goals more effectively than allowing him to recover. By contrast, where the plaintiff's own purchases exceed the sales resulting from his promotional efforts, a complete bar to the plaintiff's recovery would work a forfeiture entirely out of proportion to any harm he may have caused and would leave the defendant with the fruits of his violation.[14] Aside

[13] In *Can-Am*, the plaintiff, in addition to purchasing unregistered interests in oil and gas wells, also "enthusiastically and successfully" urged others to do so as well. For her promotional efforts, the plaintiff received an additional interest in the oil leases. 331 F.2d at 373. The court rejected the defendant's claim that the plaintiff's participation placed her *in pari delicto*, stating that, although her role as a "pure investor" was "adulterated when she actively assisted in selling [to] others" (*ibid.*), she nevertheless was primarily an investor and therefore was not barred from suing the promoter. See *id.* at 373-374.

[14] The courts are justly hesitant to bar a plaintiff's recovery on the grounds of *in pari delicto* when doing so would result in a harsh forfeiture or the unjust enrichment of the defendant. See, *e.g.*, *Stoffela* v. *Nugent*, 217 U.S. 499, 501 (1910); *Ryan* v. *K.V.L., Inc.*, 88 P.2d 836, 840-841 (Wash. 1939); *Norwood* v. *Judd*, 93 Cal. App. 2d 276, 209 P.2d 24 (1949); see also Restatement (Second) of Contracts § 197 & comment *b* (1981) ("[A] party has no claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy unless denial of restitution would cause disproportionate forfeiture.").

from comparison of securities bought and promoted, another important consideration is whether the plaintiff has arranged an underwriting for the offering or prepared the offering materials: such a plaintiff is likely to be more than a mere investor.

2. Even if the plaintiff is primarily a promoter rather than an investor, the selling issuer should not escape liability unless the plaintiff also bears at least substantially equal responsibility for the violation of the Act. It is the issuer's obligation to register the securities (Section 6(a), 15 U.S.C. 77f(a)), and if the issuer could avoid liability simply by selling to an underwriter for resale,[15] the deterrent effect of Section 12(1) would

[15] Persons who buy securities from an underwriter who has bought them from the issuer may not sue the issuer, because the "purchased from him" language of Section 12 limits liability to the buyer's immediate sellers. See page 20, *infra*.

For that reason, where a Section 12 plaintiff has purchased and *resold* unregistered securities, rather than assisting in sales to third persons by the defendant, the *in pari delicto* defense, if allowed, could interfere with investor protection and could, therefore, be inappropriate. In that situation, which is not present here, Section 12 would not permit an action by the second purchaser against the original seller. If the first purchaser's suit were barred, he might not have the money to pay the rescission claims brought against him by the second purchaser. In some such situations, "the enforcement of § 12(1) * * * can be best promoted within the present framework of the law by allowing each purchaser in the chain of distribution to pursue an action against [his own] seller" (*Lawler*, 569 F.2d at 1293-1294). The person who purchased from the plaintiff could be protected by imposing a constructive trust on any recovery by the plaintiff. See *Lawler*, 569 F.2d at 1293 n.6; *Katz* v. *Amos Treat & Co.*, 411 F.2d at 1054.

be undermined. See *Lawler* v. *Gilliam*, 569 F.2d 1283, 1293 (4th Cir. 1978). Moreover, under *Berner*, the plaintiff is not *in pari delicto* unless, "as a direct result of his own actions, [he] bears at least substantially equal responsibility" (472 U.S. at 310) for the underlying misconduct. In an action under Section 12(1), this requires that the plaintiff be at least equally responsible for the actions that make the sales of the unregistered securities illegal—namely, the issuer's failure to register the securities or the decision to conduct the offering in a manner that required registration.

Because it is the issuer's responsibility to register the securities, the purchaser's knowledge that the securities are unregistered cannot, by itself, constitute equal fault, as the court of appeals correctly concluded (Pet. App. 11-12). See *Woolf* v. *S. D. Cohn & Co.*, 515 F.2d at 604; *Neuwirth Investment Fund, Ltd.* v. *Swanton*, 422 F. Supp. 1187, 1198 (S.D.N.Y. 1975); *Wassel* v. *Eglowsky*, 399 F. Supp. 1330, 1365 (D. Md. 1975), aff'd, 542 F.2d 1235 (4th Cir. 1976). The registration provisions are designed to provide the purchaser with "full disclosure of information * * * necessary to informed investment decisions." See *SEC* v. *Ralston Purina Co.*, 346 U.S. 119, 124 (1953) (footnote omitted). Barring the investor's recovery under the *in pari delicto* doctrine, "at least on the basis solely of the buyer's knowledge of the violation, is so foreign to the purpose of the section that there is hardly a trace of it in the decisions under" Section 12. 3 L. Loss, *Securities Regulation* 1694 (2d ed. 1961) (footnote omitted).[16]

The Commission believes that where, in addition to promoting an offering, the plaintiff, for example, induced

[16] In addition, Section 14 of the Securities Act, 15 U.S.C. 77n, prohibits "[a]ny condition, stipulation, or provision * * * waiv[ing] compliance with [the Act] * * *." A bar to recovery based solely on the plaintiff's knowledge might constitute an indirect waiver of compliance with the Act, in contravention of Section 14. See *Meyers* v. *C & M Petroleum Producers, Inc.*, 476 F.2d 427, 429 (5th Cir.), cert. denied, 414 U.S. 829 (1973); *Can-Am Petroleum Co.* v. *Beck*, 331 F.2d at 373.

the issuer not to register, perhaps to save time or expense, he should not be allowed to obtain Section 12(1) rescission. Similarly, where the plaintiff was at least equally responsible for the decision to make the offering in a manner that required registration—for example, by offering the shares publicly or as an interstate offering—the plaintiff's suit should be barred. See *Perma Life Mufflers, Inc.*, 392 U.S. at 148 (emphasis in original) (Fortas, J., concurring) (if the plaintiff "*originated and insisted* upon the inclusion of a * * * clause" violating the antitrust laws, he "could not recover damages based upon this, if, essentially, it is his own act"). The *in pari delicto* doctrine is designed to deter precisely this type of conduct: "[p]laintiffs who are truly *in pari delicto* are those who have themselves violated the law in cooperation with the defendant" (*id.* at 153 (footnote omitted) (Harlan, J., concurring in part and dissenting in part)).[17]

3. The district court's findings in this case are not adequate to determine whether Dahl (1) was primarily a promoter of the offering and (2) bears at least substantially equal responsibility for the failure to register the securities or for the decision to conduct the offering

[17] In considering the *in pari delicto* defense in Section 12(1) actions, courts frequently focus on the extent to which the plaintiff and the defendant cooperated in developing and carrying out the scheme to distribute unregistered securities. See, *e.g.*, *Katz* v. *Amos Treat & Co.*, 411 F.2d at 1054 (considering whether plaintiff "so made himself a part of the basic violation [by concealing the number of purchasers so as to make an offering appear private] that recovery should be denied on the basis of *in pari delicto*"); *Lawler* v. *Gilliam*, 569 F.2d at 1292-1293 (considering whether plaintiff's own offering of unregistered securities in return for funds to be invested in defendant's unregistered securities was in cooperation with defendants); *Malamphy* v. *Real-Tex Enterprises, Inc.*, 527 F.2d 978 (4th Cir. 1975) (plaintiff, a sales manager in defendant company who used his own purchase of unregistered securities to enhance his ability to sell securities to the public on behalf of defendant, was active participant in illegal scheme and barred from rescinding his own purchases by *in pari delicto* doctrine).

in a manner that required registration. The district court's findings lend some support to the conclusion of the dissent in the court of appeals that Dahl was a "catalyst" for the offering and the sales to the other plaintiffs: he loaned money to Pinter and urged his associates to purchase the interests. On the other hand, it is unclear whether he was more a promoter than an investor, for he certainly invested substantially more money than his co-plaintiffs, whose participation he solicited. Moreover, the district court made no findings with regard to who was responsible for the failure to register or for the manner in which the offering was to be conducted. We therefore believe that it would be appropriate to remand this case for further findings.

II. A PERSON OTHER THAN THE PERSON WHO PASSED TITLE TO THE SECURITY MAY BE LIABLE UNDER SECTION 12(1) ONLY IF HE SOLICITED THE BUYER'S PURCHASE OF THE SECURITY, *I.E.*, URGED THE BUYER TO PURCHASE THE SECURITY, MOTIVATED IN SIGNIFICANT PART EITHER BY HIS OWN FINANCIAL INTERESTS OR BY THOSE OF THE SECURITY OWNER

Section 12(1) of the Securities Act makes any person who "offers or sells" a security in violation of the registration requirements liable for rescission to any person "purchasing such security from him." Liability under the provision is not limited to the owner who passed title to the buyer. It also extends to any person who solicited the purchase.

A. Section 12(1) provides in pertinent part (emphasis added):

> Any person who—* * * *offers or sells* a security in violation of [Section 5] * * * * * shall be liable to the person *purchasing such security from him*, who may sue * * * to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, * * * or for damages if he no longer owns the security.

The provision defines the class of defendants who may be subject to the specified rescissionary liability [18] in two stages: first, the defendant must have offered or sold the security; second, among such persons, only a defendant "from" whom the plaintiff buyer "purchased" may be liable.[19]

The statutory definitions of "offer" and "sell" (Section 2(3), 15 U.S.C. 77b(3)) bring within the first class, which sets an outer limit on the range of persons who may be liable under Section 12(1), not only those who pass title but also those who "attempt or offer to dispose of, or [make a] solicitation of an offer to buy, a security." [20] The second condition of liability under

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[18] Section 12 was adapted from common law rescission (3 L. Loss, *supra*, at 1700), but it also permits damages if the purchaser no longer owns the security. In that respect (and other respects, see note 27, *infra*), the provision was a change from common law rescission, which provided for restoration of the status quo by requiring the buyer to return what he received from the seller. See generally Shulman, *supra*, 43 Yale L.J. at 244-245. The change reflected the judgment that the buyer's right to relief should not depend upon "an irrelevant chance phenomenon" such as his disposition of the security (*id.* at 245).

[19] In addition, Section 15 of the Act, 15 U.S.C. 77o, makes a "controlling person" liable for the Section 12 liability of a controlled person.

[20] Two recent decisions of this Court suggest that the phrase "offers or sells" in Section 12(1) may be read broadly, to reach not only persons who pass title, but also persons who promote the sale. In *United States* v. *Naftalin*, 441 U.S. 768 (1979), this Court held that a defendant's placing of sell orders with a number of brokers constituted an "offer or sale of securities." The Court stated that "[t]he statutory terms, which Congress expressly intended to define broadly, * * * are expansive enough to encompass the entire selling process, including the seller/agent transaction" (441 U.S. at 773). In *Rubin* v. *United States*, 449 U.S. 424 (1981), the Court held that a pledge of stock as collateral for a bank loan is an offer or sale within the meaning of Section 17(a), 15 U.S.C. 77q(a). Noting the broad definition of sale under Section 2(3), the Court stated that "[i]t is not essential under the terms of the Act that full title pass to a transferee for the transaction to be an 'offer' or a 'sale' " (449 U.S. at 430).

Section 12(1)—that the plaintiff must have "purchased" the security "from" the defendant—narrows the class of defendants. One important consequence, entailed by the "from him" language, is that Section 12(1), like Section 12(2)[21] but unlike Section 11,[22] imposes liability only on the buyer's "immediate sellers" (Douglas & Bates, *supra*, 43 Yale L.J. at 177; see also Shulman, *supra*, 43 Yale L.J. at 243). The purchaser cannot recover from the seller's seller.[23]

Although it must be true of a Section 12(1) defendant that the buyer "purchas[ed the] security from him," that requirement does not restrict liability to the owner of the security. A natural reading of the statutory language would include at least some persons who urged the buyer to purchase. For example, a seller's agent who solicited the purchase would commonly be said, and be thought by the buyer, to be among those "from" whom the buyer "purchased." The First Circuit made essentially this point about the meaning of the statutory language (which was then slightly different, see page 22, *infra*) in a 1940 case concerning the liability of a broker who was acting as an agent of the seller. The court observed that "a selling agent in common parlance would describe himself as a 'person who sells,' though title passes from his principal, not from him (*Cady* v. *Murphy*, 113 F.2d 988, 990, cert. denied, 311 U.S. 705 (1940)). If such an agent is fairly described as one who "sells" to the buyer, he is also fairly described as one "from" whom the buyer "purchased." *Ibid.*

[21] The "offers or sells" language and the "purchasing such security from him" language that governs Section 12(1) also governs Section 12(2), which provides a securities purchaser with a similar rescissionary cause of action for misrepresentations. Courts have not defined the defendant class differently for purposes of Section 12(1) and (2), and we do not believe the statute permits a different construction. See *Schillner* v. *H. Vaughan Clarke & Co.*, 134 F.2d 875, 878 (2d Cir. 1943) ("[c]learly the word [sell] has the same meaning in subdivision (2) as in subdivision (1) of Section 12").

[22] Section 11, 15 U.S.C. 77k, imposes civil liability for false or misleading statements or omissions in a registration statement on a carefully defined range of participants in an offering. See note 28, *infra*.

[23] Courts sometimes refer to this limitation of liability as a privity requirement. See, *e.g.*, *Collins* v. *Signetics Corp.*, 605 F.2d 110 (3d Cir. 1979). Thus, "in the case of the typical 'firm-commitment underwriting,' the ultimate investor can recover only from the dealer who sold to him. But the dealer in turn can recover over against the underwriter, and the latter * * * against the issuer * * *." 3 L. Loss, *supra*, at 1719-1720.

The extension of Section 12 liability beyond the person who passes title has been frequently and widely recognized since the passage of the Act. Thus, it has long been "quite clear," as *Cady* indicates, that when a broker acting as agent of one of the principals to the transaction successfully solicits a purchase, he is a person from whom the buyer purchases within the meaning of Section 12. 3 L. Loss, *supra*, at 1713. Accord, *Johns Hopkins University* v. *Hutton*, 297 F. Supp. 1165, 1208-1209 (D. Md. 1968), rev'd on other grounds, 422 F.2d 1124, 1128 (4th Cir. 1970), cert. denied, 416 U.S. 916 (1974); *Boehm* v. *Granger*, 42 N.Y.S.2d 246, 248 (1943), aff'd, 268 A.D. 855, 50 N.Y.S.2d 845 (1944); see also Douglas & Bates, *supra*, 43 Yale L.J. at 206-207. This view has a firm basis in common law.[24] And if a broker acting for the seller is liable, there is no reasonable basis for

[24] The *Cady* court cited several common-law decisions providing for an agent's liability for his principal's rescissionary damages. In particular, in *Peterson* v. *McManus*, 187 Iowa 522, 172 N.W. 460 (1919), the agent had received the purchaser's payment and forwarded the money to his principal. The court in *Peterson* reasoned that, "if he [the principal] does not restore, why should not the agent be made to return money that would never have reached the principal if the agent had not, by fraud, induced the one he dealt with to part with the money?" (187 Iowa at 546, 172 N.W. at 469). See also *Pridmore* v. *Steneck*, 120 N.J. Eq. 567, 572-573, 186 A. 513, 516 (Ch. 1936), aff'd, 122 N.J. Eq. 35, 191 A. 861 (1937) (citing New Jersey cases); *Mack* v. *Latta*, 178 N.Y. 525, 71 N.E. 97 (1904) (citing cases in English courts of equity); Restatement (Second) of Agency § 339 (1958); Restatement of Agency § 339 (1933); Restatement of Restitution § 142 (1937).

distinguishing various other persons who participate in soliciting the purchase. See 3 L. Loss, *supra*, at 1716. In *Katz* v. *Amos Treat & Co.*, 411 F.2d 1046, 1053 (2d Cir. 1969), Judge Friendly explained that a jury could conclude that an attorney working for a brokerage firm was liable under Section 12(1), as "a party to a solicitation," where he repeatedly assured the plaintiff that certain favorable statements about an offering were true. In the circumstances, it could be found that the attorney had placed the brokerage firm in a position "to tackle [the purchaser] for the money."

This construction of the "purchasing * * * from him" language of Section 12(1) receives support from the history of the phrase "offers or sells," as it is used in that section. As originally enacted in 1933, the provision stated only that any person who "sells" in violation of Section 5 shall be liable to the person "purchasing * * * from him" (Act of May 27, 1933, ch. 38, § 12, 48 Stat. 84). But the term "sell" was defined to "include every contract of sale or disposition of, attempt or offer to dispose of, or *solicitation of an offer to buy*, a security * * *" (§ 2(3), 48 Stat. 74 (emphasis added)). Since "sells" and "purchases" obviously have correlative meanings, the fact that Congress expressly defined "sells" to include one who "solicits" suggests that the class of those from whom the buyer "purchases" may likewise extend to persons who solicit him.

Section 12 took its current form by the addition of "offers or" in 1954 amendments to the Act. "Solicitation" is now included only in the statutory definition of "offer" and is no longer included in the statutory definition of "sells." The change in Section 12, however, was merely a technical alteration to conform the provision to changes made for other purposes in Section 5 and in the definitions in Section 2(3). See Act of Aug. 10, 1954, ch. 667, § 9, 68 Stat. 686. It was intended to preserve the existing law, including the full range of liability provided for by the pre-1954 version. See H.R. Rep. 1542, 83d Cong., 2d Sess. 5, 6, 13-14, 26 (1954); S. Rep. 1036, 83d Cong., 2d Sess. 18 (1954); 3 L. Loss, *supra*,

at 1695-1696. Hence the implication in the original text, recognized by the *Cady* court in 1940, that the buyer "purchases from" persons who solicit him, retains its original force: there is no reason to think Congress intended to narrow the meaning of "purchased from" when it amended the statute in 1954.

The imposition of liability on brokers and others who solicit securities purchases furthers the purposes of the Securities Act. Congress intended that the civil liabilities under the Act be both compensatory and in terrorem. Douglas & Bates, *supra*, 43 Yale L.J. at 173; Shulman, *supra*, 43 Yale L.J. at 227. It is important that this in terrorem effect extend to persons who solicit purchases. "The solicitation of a buyer is perhaps the most critical stage of the selling transaction and the stage in which investor protection is especially critical." Schneider, *Section 12 of the Securities Act of 1933: The Privity Requirement in the Contemporary Securities Law Perspective*, 51 Tenn. L. Rev. 235, 272 (1984) (footnote omitted).

B. Although it is well-established that a person may be liable under Section 12(1) even though he was not himself the person who passed title, we agree with the court of appeals that Congress did not intend to impose liability on a person who induces the purchase but whose motivation is to help the buyer. The language and purpose of Section 12(1) suggest that liability should extend only to persons who successfully solicit the purchase, motivated at least in significant part by a desire to serve their own financial interests or those of the owner.

The statute restricts liability to those from whom the buyer "purchased." Even when construed in light of the statutory definitions of "offers or sells" (Section 2(3), 15 U.S.C. 77b(3)), which include "solicitation," the "purchased from" language means that not all who propose a securities purchase can be within the reach of Section 12(1). When a person merely urges another—even strongly or enthusiastically—to make a securities purchase and his motive is to assist the buyer, it is strained to describe this as "soliciting" or "selling," and it is

strained to say that the buyer "purchased" from him. See, *e.g.*, *Black's Law Dictionary* 1248 (5th ed. 1979): *Webster's New International Dictionary* (2d ed. 1934) ("solicit" means to "approach with a request or a plea, as in *selling, begging*, etc.") (emphasis added). In such a situation, Congress could hardly have intended to subject such a person to rescission based on strict liability. As the court of appeals stated, "a rule imposing liability (without fault or knowledge) on friends and family members who give one another gratuitous advice on investment matters unreasonably interferes with well-established patterns of social discourse" (Pet. App. 14).

A person who urged the buyer to purchase should, however, be liable when a significant motivation was to serve his own financial interests or those of the owner. If, but only if, he had such a motivation, it is fair to say that the buyer "purchased" the security from him and to align him with the owner in a rescission action. Typically, as the court of appeals believed, a person who solicits the purchase will have sought or received a personal financial benefit from the sale, such as where he "anticipat[es] a share of the profits" (*Lawler* v. *Gilliam*, 569 F.2d at 1288) or receives a brokerage commission (see *Cady* v. *Murphy*, 113 F.2d at 990). But a person who solicits the buyer's purchase in order to serve the financial interests of the owner may properly be liable under Section 12(1) without a showing that he expects to participate in the benefits the owner enjoys.

Contrary to the suggestion of the dissent in the court of appeals (Pet. App. 18 n.3), the financial benefit requirement is not necessarily satisfied merely because, by inducing other persons to buy, a buyer reduces his own risk. When there exists strong investor demand for an offering, a buyer can hardly be said to have benefited financially merely by inducing one group of potential investors, such as his friends and relatives, to purchase interests that otherwise would be purchased by other persons. Nor could such a benefit be present when the Section 12(1) defendant has the financial ability and actual desire to purchase the additional shares himself but, out

of generosity, urges his friends and relatives to buy, even though their purchases reduce his own risk. On the other hand, where it can be shown that the Section 12(1) defendant seeks other purchasers because he is unwilling to put more of his own money at risk in the investment and, absent such additional purchases, the offering might not succeed, then the financial benefit requirement would, we believe, be satisfied.

C. In this case, it is not clear whether Dahl had the sort of interest in the sales to others that should make him liable as a seller. The dissent argued that Dahl received a financial benefit from his friends' purchases: "More investors means that the investment program receives the requisite amount of financing at a smaller risk to each investor" (Pet. App. 18 n.3). The majority's opinion did not mention this asserted "benefit," which, as we have suggested, cannot be sufficient by itself. But Dahl did more than simply purchase securities and urge purchases by his friends, relatives, and colleagues: he participated in significant ways in initiating the entire investment. Neither the court of appeals nor the district court made findings that focused on whether Dahl urged the other purchases in order to further some financial interest of his own or of Pinter's. Under these circumstances, a remand for further findings would be appropriate.

D. In the present case, aside from the question whose interests he was serving when he urged his co-plaintiffs to purchase the securities, Dahl clearly solicited their purchases. See Pet. App. 34. Accordingly, it is not necessary in this case to resolve the question whether Section 12(1) liability extends to persons who are less actively involved in the selling process—to all persons who are "substantial factor[s] in causing the transaction to take place," as the court of appeals suggested (Pet. App. 13), or, as other courts have held, to all "aiders and abettors." [25] Nevertheless, because the court of appeals articu-

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[25] See, *e.g.*, *Klein* v. *Computer Devices, Inc.*, 602 F. Supp. 837, 840-841 (S.D.N.Y. 1985); *Hill* v. *Equitable Bank National Ass'n*, 599 F. Supp. 1062, 1083 n.23 (D. Del. 1984) (citing cases); *In re*

lated the broader "substantial factor" test in determining Dahl's Section 12(1) liability, the Commission believes it appropriate to explain why, in its view, that test is too broad.

There is no support in the statutory language for expansion of Section 12 rescissionary liability beyond persons who pass title and persons who "offer," including those who "solicit" offers; nor do we know of any support for the expansive view in the legislative history. Moreover, such expanded liability goes very far beyond the traditional scope of the remedy of rescission.[26] Section 12 liability is based not on scienter but rather on strict liability (Section 12(1)) or negligence (Section 12(2)). Yet, at common law, the rule was that, in the absence of privity, persons were liable only where they acted with scienter. See, *e.g.*, *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 174 N.E. 441 (1931) (Cardozo, C.J.) (refusing to hold an accountant liable for negligence to an investor or shareholder with whom he was not in privity). While Congress plainly intended that Section 12 depart in various respects from the common law remedy,[27] such departures were carefully defined in

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Caesars Palace Securities Litigation, 360 F. Supp. 366, 381 (S.D.N.Y. 1973).

[26] See, *e.g.*, *Voytovich* v. *Bangor Punta Operations, Inc.*, 494 F.2d 1208, 1211 (6th Cir. 1974); *Gordon* v. *Burr*, 506 F.2d 1080, 1083 (2d Cir. 1974). See generally 3 A. Corbin, *Corbin on Contracts* § 613 (1960); 5 *id.* § 1104 (1964).

[27] Congress expressly changed the common law remedy of rescission to make available damages when the buyer no longer owns the security (see note 18, *supra*). In addition, the Section 12(2) plaintiff, unlike the buyer seeking common law rescission, is not required to prove reliance on the misstatement or omission. Congress also altered the common law to provide the Section 12(2) defendant with the defense, as to which he bears the burden of proof, that he was excusably ignorant of the untruth or omission. Further, in Section 13 of the Act, 15 U.S.C. 77m, Congress imposed a statute of limitations, thus replacing the doctrine of laches at common law. See generally 3 L. Loss, *supra*, at 1704-1705; Shulman, *supra*, 43 Yale L.J. at 243-244.

the statute.[28]

The court of appeals' broad theory could have striking consequences. Both the "substantial factor" test and the aiding-and-abetting principle might expose securities professionals, such as accountants and lawyers, whose sole involvement is the performance of professional services and who have no contact with the purchasers, to Section 12 liability for rescission without proof of scienter.[29] The buyer does not, in any meaningful sense, purchase the security from such persons. In the absence of any expression of congressional intent to override the common law—and no such intent can be found—persons other than the owner who do not solicit should not be subject to liability under Section 12.[30]

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[28] Congressional care in defining liability is also reflected in Section 11, 15 U.S.C. 77k. That section provides a cause of action for damages in favor of a person acquiring securities pursuant to a registration statement that misstates or omits a material fact. Section 11(a) sets forth precisely the various categories of persons who are subject to suit under Section 11, and Section 11(f) provides rights of contribution for the multiple defendants. The fact that Congress included no similar provisions in Section 12, and merely provided that a person who "offers" or "sells" a security shall be liable to the "person purchasing such security from him," is further indication that a broadening of the scope of Section 12 is inconsistent with the congressional intent.

[29] See, *e.g.*, *Excalibur Oil, Inc.* v. *Sullivan*, 616 F. Supp. 458, 466 (N.D. Ill. 1985) (where attorney provided title opinion but did not "solicit" or "induce" purchase, and, in fact, plaintiff "had been 'sold' on the desirability of the investment before it ever met [defendant attorney]," attorney nonetheless held liable under Section 12(2)); *Sandusky Land, Ltd.* v. *Uniplan Groups, Inc.*, 400 F. Supp. 440, 442-444 (N.D. Ohio 1975) (where an accounting firm allegedly issued false opinions, firm held subject to liability under Section 12(2)); but see *Barker* v. *Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 494 (7th Cir. 1986) (affirming summary judgment in favor of accountants and lawyers); *Stokes* v. *Lokken*, 644 F.2d 779, 785 (8th Cir. 1981) (attorney who prepared incorrect opinion letter on registration requirement of Section 5 not liable under Section 12). *Cf. Ahern* v. *Gaussoin*, 611 F. Supp. 1465 (D. Or. 1985) (attorney who directly solicits purchase may be liable under Section 12).

[30] We note that the Commission's view that aiding-and-abetting liability for aiding and abetting is appropriate under Section

III. SEC LAW ENFORCEMENT ACTIONS FOR VIOLATION OF THE REGISTRATION PROVISIONS MAY BE BROUGHT AGAINST PERSONS WHO ARE NOT LIABLE IN PRIVATE ACTIONS UNDER SECTION 12(1)

Although, in our view, being a "substantial factor" in or "aiding and abetting" an unregistered sale of securities is not sufficient to render a defendant liable under Section 12(1), such a defendant may well be subject to a law-enforcement action, brought by the Commission, alleging violation of the registration requirements of Section 5. Because of significant differences between Commission actions under Section 5 and private Section 12(1) actions, the Commission may obtain relief against a broad range of persons, including aiders and abettors, who neither pass title nor engage in solicitation.[31]

Although both Section 5 and Section 12 speak in terms of offers and sales, there are important differences between the sections. A Section 5 violation does not require a completed sale at all, and a Commission action is not subject to the restrictive language of Section 12 that limits liability to the persons "from" whom the buyer purchased. Because Section 5 does not view the matter from the buyer's perspective, as Section 12 does, some persons who help bring about a securities offering may fairly be said to have engaged in an offer or sale of a security (within the meaning of Section 5), even if

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tend to private actions under other provisions that are not based on equitable rescission and that do not impose liability without regard to fault, such as Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b). Cf. *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 379 n.5 (1983); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 192 n.7 (1976) (leaving open the question whether civil liability for aiding and abetting is appropriate under Section 10(b)).

[31] We also note that the Commission need not show a financial benefit. See *SEC* v. *North American Research & Development Corp.*, 424 F.2d 63, 81-82 (2d Cir. 1970).

they cannot be said to have sold it to a particular buyer (within the meaning of Section 12). Moreover, whereas Section 12 requires that the person actually offer or sell the security, Section 5 broadly makes it unlawful for any person "directly or indirectly" to offer or sell unregistered securities. See, *e.g.*, *SEC* v. *Holschuh*, 694 F.2d 130, 140 (7th Cir. 1982). Thus, Section 5, unlike Section 12, by its terms covers the conduct of persons other than those who directly offer or sell.

The differences in applicable statutory language reflect the difference in remedies between a private Section 12 action and a Commission action. Unlike a private action under Section 12, a Commission action is not derived from common-law rescission, which, as we have explained, limits the range of persons liable. Moreover, it is appropriate that injunctive relief against future violations—the most common remedy in Commission actions—should be available against collateral participants who should not be liable for rescission. See *SEC* v. *Coven*, 581 F.2d 1020, 1027-1028 (2d Cir. 1978) ("The essential nature of an SEC enforcement action is equitable and prophylactic; its primary purpose is to protect the public against harm * * *."), cert. denied, 440 U.S. 950 (1979); see also *SEC* v. *Murphy*, 626 F.2d 633, 649 n.17 (9th Cir. 1980).[32]

As a result of these distinctions, well-developed case law has established that a broader range of persons may be liable, on both primary and secondary liability principles, in Commission actions under Section 5 than may be liable in private actions under Section 12. As to primary liability, the Commission may take action under Section 5 against "those who are engaged in steps necessary to the distribution of security issues." *SEC* v. *Chinese Consoli-*

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[32] See also 3 L. Loss, *supra*, at 1716 n.165: "[A] newspaper which publishes advertisements in violation of § 5 becomes itself a violator as an aider and abettor, subject to injunctive and criminal proceedings. * * * But it is hardly consistent with the statutory purpose that newspapers be subjected to civil liability under § 12."

dated Benevolent Ass'n, Inc., 120 F.2d 738, 741 (2d Cir.), cert. denied, 314 U.S. 618 (1941). Thus, "those who had a necessary role in the transaction are held liable as participants" (*SEC* v. *Murphy*, 626 F.2d 633, 650-651 (9th Cir. 1980) (footnote omitted)). See *SEC* v. *Holschuh*, *supra*; *SEC* v. *Int'l Chemical Development Corp.*, 469 F.2d 20, 28 (10th Cir. 1972). Under this "participant" theory, persons who neither are in privity nor solicited a purchase are proper defendants in Commission actions. See, *e.g.*, *SEC* v. *Holschuh*, *supra*.

As to secondary liability, the Commission has frequently charged as aiders and abettors persons who, although they are collateral actors in the selling process, are aware of and substantially assist in the violation. See *SEC* v. *Murphy*, 626 F.2d at 651 n.20 (citing cases); see generally Ruder, *supra*, 120 U. Pa. L. Rev. at 645-646.[33] For example, an official and major shareholder in a brokerage firm who exercised various management functions was found liable as an aider and abettor of his firm's violations of Section 5. *SEC* v. *National Bankers Life Ins. Co.*, 324 F. Supp. 189, 196 (N.D. Tex. 1971). We urge that the Court make clear that application of a broad test for primary liability and the availability of secondary liability in Commission enforcement actions under Section 5 are unaffected by a holding as to the scope of private actions under Section 12.

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[33] In general, the courts have held that, to establish aiding and abetting liability, three elements must be proven: (1) a securities law violation by the primary party; (2) general awareness by the alleged aider and abettor that his role was part of an overall activity that was improper; and (3) substantial assistance by the alleged aider and abettor in the violation. See *SEC* v. *Washington County Utility Dist.*, 676 F.2d 218, 224 (6th Cir. 1982); *Cleary* v. *Perfectune, Inc.*, 700 F.2d 774, 777 (1st Cir. 1983); *Investors Research Corp.* v. *SEC*, 628 F.2d 168, 178 (D.C. Cir.), cert. denied, 449 U.S. 919 (1980); *Decker* v. *SEC*, 631 F.2d 1380, 1387-1388 (10th Cir. 1980); *SEC* v. *Coven*, 581 F.2d 1020, 1028 (2d Cir. 1978); *Woodward* v. *Metro Bank*, 522 F.2d 84, 94-95 (5th Cir. 1975); *SEC* v. *Coffey*, 493 F.2d 1304, 1316 (6th Cir. 1974), cert. denied, 420 U.S. 908 (1975).

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted.

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Securities and Exchange Commission

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